246 N.C. App.—No. 1 Pages 1-190

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MAY 29, 2018

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OF
NORTH CAROLINA

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[1]Appointed 1 August 2016 [2]Sworn in 1 January 2017 [3]Sworn in 1 January 2016 [4]Appointed 24 April 2017
[5]Retired 31 December 2016 [6]Retired 24 April 2017

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COURT OF APPEALS

CASES REPORTED

FILED 1 MARCH 2016

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

ADVERSE POSSESSION

Adverse Possession—color of title—entitlement to rents—The trial court did not err in part by concluding that plaintiffs were not entitled to rents for the period that Thomas Harris and his daughters occupied the pertinent property under color of title. There was no evidence tending to show that Thomas Harris prevented his siblings' access to the pertinent property at any point. However, on remand defendants' betterment value could be offset by the fair market value of the rent for the period between the delivery of the 1993 deed and the death of Mr. Harris, Sr., in 1997. **Harris v. Gilchrist, 67.**

APPEAL AND ERROR

Appeal and Error—interlocutory orders and appeals—preservation of issues—denial of motion to dismiss—An appeal from the denial of a motion to

did not err by denying defendants' motion for judgment notwithstanding the verdict. Plaintiffs' claims for trespass and nuisance did not fail as a matter of law because plaintiffs presented evidence that they installed a filtration system on their well as a result of the contamination and that the remediation process, which included the digging of numerous monitoring wells on plaintiffs' property, caused substantial annoyance and interference. **BSK Enters., Inc. v. Beroth Oil Co., 1.**

Oil and Gas—leak—contaminated groundwater—refusal to connect to city water—not failure to mitigate—Where underground storage tanks owned by defendant oil company leaked and contaminated the groundwater underneath plaintiffs' place of business, the trial court did not err by submitting the damages issue related to diminution in value to the jury and omitting duty to mitigate instructions. Defendant offered no evidence other than plaintiffs' refusal to connect to city water, which is specifically characterized by the Oil Pollution and Hazardous Substances Control Act as not constituting cleanup, in support of its proposed duty to mitigate instruction. **BSK Enters., Inc. v. Beroth Oil Co., 1.**

PARTIES

Parties—necessary parties—failure to properly serve—delay—Although plaintiff contended that the trial court erred by dismissing its separate claims against individual parties based upon plaintiff's failure to add necessary parties, it was not the legal basis of the trial court's order. Plaintiff's failure to properly and promptly serve all necessary parties was evidence of plaintiff's recalcitrance. **Don't Do It Empire, LLC v. Tenntex, 46.**

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Paternity—legitimization—strict compliance with statute—The trial court did not err by holding that a minor had not been legitimated based on substantial compliance with N.C.G.S. § 29-19(b)(2). Failure to meet the exact requirements of the statute leaves the child in an illegitimate position for intestate succession purposes. **In re Williams, 76.**

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SCHEDULE FOR HEARING APPEALS DURING 2018

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks in 2018:

January 8 and 22

February 5 and 19

March 5 and 19

April 2, 16 and 30

May 14

June 4

July None

August 6 and 20

September 3 and 17

October 1, 15 and 29

November 12 and 26

December 10

Opinions will be filed on the first and third Tuesdays of each month.

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

BSK ENTERPRISES, INC. AND B. KELLEY ENTERPRISES, INC., PLAINTIFFS
v.
BEROTH OIL COMPANY, DEFENDANT

No. COA15-189

Filed 1 March 2016

1. Damages and Remedies—gas leak—contaminated groundwater—remediation cost grossly disproportionate and unreasonable—damages capped at diminution in value

Where underground storage tanks owned by defendant oil company leaked and contaminated the groundwater underneath plaintiffs' place of business, the trial court did not err by entering a "Post Verdict Order" capping plaintiffs' damages at $108,500, which was the diminution in value of the property caused by the contamination. The cost of returning plaintiffs' land to its original condition was $1,492,000—more than thirteen times the diminution in value. The cost of remediation was grossly disproportionate, as no personal use exception applied, and it was unreasonable under the circumstances, as the contamination had no effect on plaintiffs' use of the property.

2. Jurisdiction—subject matter—standing—groundwater contamination

Where underground storage tanks owned by defendant oil company leaked and contaminated the groundwater underneath plaintiffs' place of business, plaintiffs had standing to bring an action to remediate the groundwater contamination. Plaintiffs owned the property at issue, giving them standing to sue under North Carolina's

Oil Pollution and Hazardous Substances Control Act and under the common law actions of trespass and nuisance.

3. Oil and Gas—leak—contaminated groundwater—refusal to connect to city water—not failure to mitigate

Where underground storage tanks owned by defendant oil company leaked and contaminated the groundwater underneath plaintiffs' place of business, the trial court did not err by submitting the damages issue related to diminution in value to the jury and omitting duty to mitigate instructions. Defendant offered no evidence other than plaintiffs' refusal to connect to city water, which is specifically characterized by the Oil Pollution and Hazardous Substances Control Act as not constituting cleanup, in support of its proposed duty to mitigate instruction.

4. Damages and Remedies—contaminated groundwater—stigma

Where underground storage tanks owned by defendant oil company leaked and contaminated the groundwater underneath plaintiffs' place of business, the Court of Appeals rejected defendant's argument that the trial court erred by awarding $108,500 in damages for diminution in value related to stigma. The trial court did not instruct the jury on stigma, and its judgment characterized the damages as related to "nuisance, trespass, and violation of NCOPHSCA [North Carolina's Oil Pollution and Hazardous Substances Control Act]."

5. Oil and Gas—contaminated groundwater—trespass and nuisance claims—annoyance and interference

Where underground storage tanks owned by defendant oil company leaked and contaminated the groundwater underneath plaintiffs' place of business and the jury awarded plaintiffs $108,500 in damages, the trial court did not err by denying defendants' motion for judgment notwithstanding the verdict. Plaintiffs' claims for trespass and nuisance did not fail as a matter of law because plaintiffs presented evidence that they installed a filtration system on their well as a result of the contamination and that the remediation process, which included the digging of numerous monitoring wells on plaintiffs' property, caused substantial annoyance and interference.

Appeal by plaintiffs from order, judgment, and rulings entered 5 and 26 June 2014 by Judge Ronald Spivey in Forsyth County Superior Court. Cross-appeal by defendant from orders entered 22 May 2014, 5 and 26 June 2014, and 9 July 2014 by Judge Ronald Spivey in Forsyth County Superior Court. Heard in the Court of Appeals 6 October 2015.

Crabtree, Carpenter & Connolly, PLLC, by Guy W. Crabtree and Mark Fogel, for plaintiff-cross-appellees.

Maynard & Harris Attorneys at Law, PLLC, by C. Douglas Maynard, Jr., and Sarah I. Young, for plaintiff-cross-appellees.

Hendrick Bryant Nerhood Sanders & Otis, LLP, by Matthew H. Bryant and Timothy W. Nerhood, for defendant-cross-appellants.

Hatch, Little & Bunn, LLP, by Justin R. Apple, Harold W. Berry, Jr., and A. Bartlette White, for amicus curiae North Carolina Petroleum & Convenience Marketers, Inc.

Law Office of F. Bryan Brice, Jr., by Matthew D. Quinn, for amicus curiae North Carolina Advocates for Justice.

Troutman Sanders LLP, by Christopher G. Browning, Jr., Sean M. Sullivan, and C. Elizabeth Hall, for amicus curiae North Carolina Chamber.

BRYANT, Judge.

First, where the cost of remediation greatly exceeds or is disproportionate to the diminution in value of property, the measure of damages should be the diminution in value caused by the contamination. Second, plaintiffs have a compensable and protectable interest in the waters beneath their land and, therefore, have standing to bring an action to remediate groundwater contamination. Third, where there is no evidence presented at trial to support a defense regarding the duty to mitigate, the trial court did not err in denying defendant's request to give a duty to mitigate instruction to the jury. Fourth, the trial court did not err in awarding damages where the court's judgment awarding $108,500.00 to plaintiff was for damages related to "nuisance, trespass, and violation of NCOPHSCA [North Carolina's Oil Pollution and Hazardous Substances Control Act]," and not damages related to stigma. Lastly, the trial court did not err in denying a motion for judgment notwithstanding the verdict where plaintiffs' claims of nuisance and trespass did not fail as a matter of law.

On 6 May 2013, plaintiffs filed a complaint alleging defendant was strictly liable for contaminated groundwater under plaintiffs' property, and sought damages to cover the cost of remediation or relocation of its

business from the property. In an answer filed 30 May 2013, defendants admitted that a petroleum release on defendant's property was discovered on 3 June 2005, but otherwise denied all other allegations made in plaintiff's complaint. After months of additional pleadings, pretrial motions, and orders, trial by jury commenced on 27 May 2014.

Defendant Beroth Oil Company was formed in 1958 as a gasoline jobber supplying fuel to gas stations. In 1987, defendant purchased an existing gas station at 4975 Reynolda Road, Winston-Salem (hereinafter "defendant's property") and in May 1988 installed five underground storage tanks ("USTs").

In March 2005, defendant prepared to market its property for sale. Defendant conducted an environmental survey of the land to provide to prospective buyers. Defendant's engineering firm, Terraquest, performed a phase-2 environmental site assessment and discovered that the USTs under defendant's property had been leaking petroleum. Defendant, through Terraquest, reported the leak to the North Carolina Department of Environment and Natural Resources ("DENR") on 3 June 2005. DENR responded and directed defendant to perform a comprehensive site assessment ("CSA"). (A CSA is a report including information DENR needs to determine the vertical and horizontal extent of the contamination.)

On 9 February 2006, plaintiffs BSK Enterprises and B. Kelley Enterprises, Inc. (collectively "plaintiffs") purchased a metal frame building at 4995 Reynolda Road, adjacent to defendant's property, for $130,000.00. Plaintiffs used the building as a warehouse and distribution facility for plaintiffs' water filter and coffee business.

From May to August 2010, Terraquest conducted a well-water survey to determine the location, number, and operating status of wells in the vicinity of defendant's property. On 28 June 2010, plaintiffs received a letter from DENR which indicated that a well-water sample taken from the well on plaintiffs' property had detected contaminates and that such testing was part of an investigation of a petroleum leak. On 8 November 2010, plaintiffs received a certified letter from Terraquest requesting access to plaintiffs' property for the installation of monitoring wells to assess the extent of groundwater contamination caused by a release of petroleum from defendant's property. Defendant did not receive approval from plaintiffs to install the wells until May 2011.

On 19 October 2011, Terraquest's findings were reported to DENR in a CSA report, per DENR's request. Terraquest determined that no

"free product"[1] or soil contamination was found on plaintiffs' property. The release of dissolved petroleum constituents in the groundwater from defendant's property had migrated under plaintiffs' property as a "dissolved phase plume"[2] in the subsurface groundwater. On 29 November 2011, DENR ordered that a Corrective Action Plan ("CAP") be submitted to DENR.

As of March 2013, levels of contamination in the groundwater in the monitoring wells on plaintiffs' property were under Gross Contaminate Levels ("GCLs")[3] but above the "2L standards"[4] for some petroleum constituents.

On 10 October 2013, Terraquest submitted its CAP for DENR's review. The CAP examined multiple remediation strategies for defendant's property only and discussed each in detail. The CAP proposed using the following active remediation methods: (1) Air Sparging, which reduces the dissolved phase plume in groundwater; (2) Mobile

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1. Free product is a concentration of petroleum in a particular area.

2. A plume is the area where contamination has migrated, and a dissolved phase plume means that gas has dissolved in the water such that it is not visually detectable.

3. As explained at trial by environmental consultant Ryan Kerins of Terraquest Environmental Consultants,

> [G]ross contamination levels . . . are for the most part . . . a thousand times the 2Ls and they are used more in the risk function. They exist as a risk so when you are ranking sites high, intermediate or low where do they fall? If there are no wells with people drinking water out of [them] and there's not an explosion threat or anything like that then maybe it is not a high risk but if there is still contamination above a thousand times the drinking water standard then it is something that needs to get dealt with.

4. At trial, Kerins also defined "2L standards":

> 2L standards are viewed every three years by the environmental management commission. They are the maximum allowable levels of contaminants without endangering human health or otherwise impacting any drinking water source. [The commission] want[s] to make sure that there's not more than a one and [sic] a million chance in a lifetime at a particular contamination level that you would be at added risk of cancer . . . .
>
> [The commission] also consider[s] things like the taste threshold, other secondary type[s] of contaminants. They look at the federal contamination levels when they come up with these 2L standards. So those are the strictest standards.

2L standards are also defined in Title 15A NCAC 2L.0202(g).

Multi-Phase Extraction ("MMPE"), which removes free product; and (3) Soil Vapor Extraction, which reduces soil contamination. There was no active remediation proposed for plaintiffs' property.

In response to concerns raised by plaintiffs regarding the lack of corrective action for plaintiffs' property, DENR explained that the highest contamination was on defendant's property and that addressing the source area on defendant's property would have the biggest impact on the dissolved phase plume on plaintiffs' property and was the typical approach for groundwater cleanups in North Carolina. Additionally, according to DENR, the active remediation performed on defendant's property would remediate plaintiffs' property by the process of natural attenuation. DENR explained that natural attenuation is a passive remediation strategy by which plaintiffs' property will be the recipient of the collateral effects of the active remediation occurring on defendant's property. At least one expert opined that it may take as long as twenty-five years for remediation through natural attenuation to occur as anticipated on plaintiff's property. However, by reducing the contamination on defendant's property, contamination levels on plaintiffs' property would be reduced as well. Terraquest's remediation strategies as set forth in its CAP were commonly accepted methods, and DENR considered them to be aggressive strategies. DENR approved the CAP.

Between 2010 and 2014, Terraquest conducted several MMPE events to remove free product, which resulted in a reduction of free product levels on defendant's property from 3.4 feet to 3 inches. The active removal of free product from defendant's property also had a positive effect on the contaminate levels in the dissolved phase plume under plaintiffs' property, including reduced levels of benzene[5] in monitoring wells on plaintiffs' property. From 28 January 2013 to March 2014, benzene levels in one monitoring well went down from 2,200 (parts per billion) to 750 and in another monitoring well, the levels went from 690 to 140. At trial, Thomas Moore, an employee of DENR, testified that, based on his reaction to these numbers, the remediation system was working and effectively cleaning up the contamination.

Defendant has admitted that it caused the release of petroleum products into the groundwater on defendant's property, which in turn

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5. Benzene is one of the compounds found in both gasoline and diesel fuel and is carcinogenic. The acceptable health level groundwater drinking standard for benzene in North Carolina is one part per billion. *See* 15A NC ADC 2L.0202(h)(9) (2013) (stating that the maximum allowable concentration for benzene in groundwater is 1 microgram per liter).

migrated onto plaintiffs' property and contaminated the groundwater. However, a water supply well test concluded that there was no restriction on the use of the well on plaintiffs' property—in other words, the water did not pose a health risk. Plaintiffs nevertheless installed water filtration systems on the property.

Plaintiffs employed an environmental engineer, Tom Raymond, to assess the costs of a cleanup. Using data and reports from Terraquest, Raymond proposed chemical oxidation and groundwater barrier remediation systems for a total cost of $1,131,000.00. Additionally, Raymond proposed drilling injection wells on plaintiffs' property. Raymond also acknowledged that it is highly unusual for a property owner that is not the responsible party to undertake remediation of the contaminated property: "That would be pretty rare for a non-responsible party to conduct a cleanup."

On 22 May 2014, just prior to trial, the trial court granted plaintiffs' partial summary judgment motion on its claims for nuisance and trespass, but not on damages, and denied defendant's motion for summary judgment. On 27 May 2014, the case was called for jury trial.

The jury found that plaintiffs' property had a fair market value of $180,000.000 in an uncontaminated state; a fair market value of $71,500.00 in its contaminated state. This resulted in a diminution in value of $108,500.00. The jury determined that the amount reasonably needed to remediate plaintiffs' property was $1,492,000.00. The jury's verdict notwithstanding, the trial court, on 5 June 2014, entered a "Post Verdict Order" which capped the remediation damages at $108,500.00, the diminution in value of the property caused by the contamination. Defendant filed a motion for judgment notwithstanding the verdict ("JNOV") and a Motion to Amend the Judgment. Judgment was entered for plaintiffs in the amount of $108,500.00 with interest and costs on 26 June 2014, and the trial court denied defendant's motions on 9 July 2014. Plaintiffs filed notice of appeal, and defendant filed notice of cross-appeal.

On appeal, plaintiffs' sole issue is whether the trial court erred in ruling that the damages necessary to remediate the contamination on plaintiffs' property were properly capped at $108,500.00, the amount of the diminished value of the property, instead of awarding reparation damages.

On cross-appeal, defendant argues that the trial court erred by: (I) not dismissing plaintiffs' claims for lack of standing; (II) omitting duty to mitigate instructions; (III) awarding damages for diminution in value

related to stigma; and (IV) denying defendant's motion for judgment notwithstanding the verdict as plaintiffs' claims for nuisance and trespass fail absent evidence of real and substantial interference with use of the property.

Plaintiffs' Appeal

[1] Plaintiffs argue that the 5 June 2015 Post-Verdict Order and 26 June 2014 Judgment entered by the trial court capping damages at $108,500.00—the diminution in value caused by the contamination—should be reversed and vacated and that judgment should be entered in favor of plaintiffs for $1,492,000.00, the amount of restoration damages as determined by the jury. Specifically, plaintiffs argue that capping the damages at diminution in value frustrates the purpose of NCOPHSCA and is contrary to legislative intent and public policy. We disagree.

The proper measure of damages is a question of law and fully reviewable by this Court. *Olivetti Corp. v. Ames Bus. Sys., Inc.*, 319 N.C. 534, 548, 356 S.E.2d 578, 586–87 (1987). "While the amount of damages is ordinarily a question of fact, the proper standard with which to measure those damages is a question of law." *Id.*

Under North Carolina law, damages to land may be recovered using one of two measures: (1) the difference in market value before and after the injury; or (2) the cost of restoring the land to its pre-injury state. *Plow v. Bug Man Exterminators, Inc.*, 57 N.C App. 159, 162–63, 290 S.E.2d 787, 789 (1982). "[F]or negligent damage to real property, the general rule is that where the injury is completed (as opposed to a continuing wrong) the measure of damages 'is the difference between the market value of the property before and after the injury.' " *Huberth v. Holly*, 120 N.C. App. 348, 353, 462 S.E.2d 239, 243 (1995) (quoting *Huff v. Thornton*, 23 N.C. App. 388, 393–94, 209 S.E.2d 401, 405 (1974), *aff'd*, 287 N.C. 1, 213 S.E.2d 198 (1975)).

"Nonetheless, replacement and repair costs are relevant on the question of diminution in value[,] and when there is evidence of both diminution in value and replacement cost, the trial court must instruct the jury to consider the replacement cost in assessing the diminution in value." *Id.* at 353, 462 S.E.2d at 243 (citations omitted). However, North Carolina courts have advised that the diminution-in-value measure of damages with respect to harm to real property suffers from excess rigidity, and should be applied, if at all, with caution. *Phillips v. Chesson*, 231 N.C. 566, 571, 58 S.E.2d 343, 347–48 (1950). Rather, when the damage to land is "impermanent" in nature, diminution in value is not an appropriate measure of damages:

> While the general rule for assessing damages to real property is diminution in market value, that measure is not appropriate where . . . the damage complained of is "impermanent." In a case involving damages of an "impermanent" nature, "various other rules are applied, such as . . . reasonable costs of replacement or repair."

Casado v. Melas Corp., 69 N.C. App. 630, 637–38, 318 S.E.2d 247, 251 (1984) (quoting *Phillips*, 231 N.C. at 571, 58 S.E.2d at 348). "[T]he cause of [an] injury is impermanent in the sense that it may be removed by the offender voluntarily or abated . . . ." *Phillips*, 231 N.C. at 571, 58 S.E.2d at 348.

Notwithstanding the permanent or impermanent nature of an injury, "the award may not, however, be 'so large as to shock the conscience.' " *Russell v. N.C. Dep't of Env't & Natural Res.*, 227 N.C. App. 306, 318–19, 742 S.E.2d 329, 337–38 (2013) (quoting *Jackson v. N.C. Dep't of Crime Control*, 97 N.C. App. 425, 432, 388 S.E.2d 770, 774 (1990)) (reversing a damages award based on the fair market value of the replacement property as a component of the total awarded, remanding the case and instructing that, "*[t]o avoid a result that might unjustly enrich Plaintiffs*, this component of the replacement cost damages should be based on a determination of the fair market value of the [p]roperty had it had suitable soil" (emphasis added)). Similarly, the commentary to the *Restatement (Second) of Torts* § 929, while placing no limitation on damages based on proportionality, nevertheless states that:

> [i]f, however, the cost of replacing the land in its original condition is disproportionate to the diminution in the value of the land caused by the trespass, *unless there is a reason personal to the owner for restoring the original condition*, damages are measured only by the difference between the value of the land before and after the harm.

Restatement (Second) of Torts § 929(1)(a) cmt. b (1979) (emphasis added).

"[A] reason personal to the owner for restoring the original condition" is an exception which permits the recovery of restoration costs to repair damage to real property even when such costs exceed the value of the land itself. *See id.* For example, "if a building such as a homestead is used for a purpose personal to the owner, the damages ordinarily include an amount for repairs, even though this might be greater than the entire value of the building." *Id.*

Businesses have not typically fallen within the ambit of the "personal reasons" or "personal use" exception and the *Restatement (Second) of Torts* § 929 mentions only homesteads, not corporations. *See Restatement (Second) of Torts* § 929(1)(a) cmt. b; *see also Russell*, 227 N.C. App. at 308, 742 S.E.2d at 331–32 (involving a failed septic system in a modular home installed on the property intended for residential use); *Plow*, 57 N.C. App. at 161–62, 290 S.E.2d at 788–89 (involving termite damage to a personal residence); *see also Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 338 Mont. 259, 272, 165 P.3d 1079, 1088 (2007) (involving an action for contamination of plaintiffs' personal residences with a carcinogen and noting "[a] personal residence represents the type of property in which the owner possesses a personal reason for repair" and "that the personal reasons for repair are usually the owner's desire to enjoy and live in their homes"). *But see G & A Contractors v. Alaska Greenhouses*, 517 P.2d 1379, 1387 (Alaska 1974) (holding that restoration damages awarded to corporation were proper even though they computed to a value of approximately $50,000.00 per acre to restore property for which the plaintiff paid $4,000.00 per acre).

In addition to the common law concerning tort claims and remedies, North Carolina has adopted the Oil Pollution and Hazardous Substances Control Act ("OPHSCA"), which was enacted "to promote the health, safety, and welfare of the citizens of this State by protecting the land and the waters over which this State has jurisdiction from pollution by oil, oil products, oil by-products, and other hazardous substances." N.C. Gen. Stat. § 143-215.76 (2015). "To accomplish this purpose, Part 2 of OPHSCA contains various provisions to control the discharge of oil." *Jordan v. Foust Oil*, 116 N.C. App. 155, 163, 447 S.E.2d 491, 496 (1994). Furthermore,

> [i]n enacting Part 2 of OPHSCA, the Legislature clearly intended to provide broad protection of the land and waters of North Carolina from pollution by oil and other hazardous substances and to thereby promote the health, safety, and welfare of the citizens of this state. Liability for damages caused to persons and property by unlawful discharges is broadly and strictly imposed on "any person having control over" such oil or other hazardous substances.

Id. at 164, 447 S.E.2d at 496–97 (quoting N.C. Gen. Stat. § 143-215.93). However, OPHSCA does not preempt or extinguish common law rights of landowners to bring claims of nuisance, trespass, etc. against polluters: "This subsection [of OPHSCA] shall not be construed to limit any

right or remedy available to a third party under any other provision of law." N.C. Gen. Stat. § 143-215.94B(b3) (2015).

Plaintiffs argue that because OPHSCA is intended to broadly and strictly impose liability for damages on the responsible party, the statute is intended to provide broad relief to victims of past and present damages, as well as to protect victims from future pollution. Plaintiffs assert that limiting damages to the diminution of the market value would essentially permit a defendant to contaminate a neighbor at will and without limitation as long as the defendant is willing to pay for the reduction in value caused by the contamination. Further, plaintiffs assert that the State-approved CAP, which is in place to clean defendant's property only, holds plaintiffs hostage to the preferred cleanup methods of the State. The CAP in this case is against public policy, plaintiffs argue, because (1) North Carolina is required by law to approve the "least expensive cleanup," and (2) a No Further Action letter may be issued at any time when the State determines that the amount of risk imposed by the contamination has reached an "acceptable level." *See* N.C. Gen. Stat. §§ 143-215.94A(2a)(d), 143-215.94V(d) (2015).

Plaintiffs therefore contend that the only appropriate remedy in this case is for restoration damages to be awarded so that plaintiffs will have control over cleaning up their property and ensure that the cleanup will happen much more quickly and effectively and in accordance with the purposes of OPHSCA. We disagree.

Here, the trial court found that the injury to plaintiffs' property was temporary or impermanent and the jury found that plaintiffs' property had a fair market value of $180,000.00 in an uncontaminated state and a fair market value of $71,500.00 after contamination. The jury also found the remediation costs to be $1,492,000. The trial court found the diminution in value of the property to be $108,500.00. The trial court agreed with plaintiffs that "the measure of damages for a temporary injury to real property in North Carolina is the restoration costs, or costs of remediation . . . ." Notwithstanding its agreement as to the measure of damages, the trial court found the following:

> [W]hen the cost of the remediation greatly exceeds or are [sic] disproportionate to the diminution in value of the property, the measure of damages should be the diminution in value caused by the contamination. The 1.492 million dollars of remediation costs awarded by the jury are more than 13 times the diminution in value as found by the jury . . . . This court will find that the remediation

> award is disproportionate to the diminution in the value of the property.

The trial court entered judgment in favor of plaintiffs in the amount of $108,500.00, for damages as a result of nuisance, trespass, and violation of OPHSCA.

The trial court noted in its extensive and comprehensive post-verdict order that this is an issue of first impression in North Carolina. As such, the trial court addressed numerous cases from other jurisdictions that apply different measures of damages in similar situations for migration of contaminants. Based on the trial court's ultimate order, however, it appears that the trial court found Section 929 of the *Restatement (Second) of Torts* and its commentary the most instructive. *See Restatement (Second) of Torts* § 929(1)(a) cmt. b. For the following reasons, we agree with the trial court's assessment of the appropriate measure of damages and subsequent award of $108,500.00 in the instant case.

First, this Court has held that "[w]hile the general rule for assessing damages to real property is diminution in market value, that measure is not appropriate where . . . the damage complained of is " 'impermanent.' " *Casado*, 69 N.C. App. at 637, 318 S.E.2d at 251. When the damage inflicted is impermanent in nature, the amount of damages assessed should be for the reasonable costs of replacement or repair. *Id.* at 637–38, 318 S.E.2d at 251. In *Casado*, the grading and paving of a road caused a "delta" of sediment composed of leaves, sticks, gravel, and other debris to be deposited into the plaintiff's pond. Although the court found that the delta was permanent, it was continuing to grow by additional sediment being deposited daily, and as such it was an impermanent or continuing injury for the purpose of measuring damages. *Id.* at 631–36, 318 S.E.2d at 248–50. As a result, the court in *Casado* remanded the case, finding that the "reasonable costs of replacement or repair" were the proper measure of damages. *Id.* at 637, 318 S.E.2d at 251; *see also Phillips*, 231 N.C. at 569–71, 58 S.E.2d at 346–48 (ordering a new trial because the court erroneously instructed the jury to compute damages under the diminution-in-value standard, rather than the reasonable cost of replacement or repair, where one private landowner's diversion of the natural flow of surface water caused periodic flooding, which in turn caused extensive damage to buildings on the private landowner's property).

Here, the contamination complained of is not sediment, debris, or surface water causing damage. Rather, the contamination is the result

of the release of petroleum associated with commercial gasoline, diesel, and kerosene from underground storage tanks ("USTs") on defendant's property. More specifically, the contamination is the result of the migration of a dissolved phase plume from defendant's to plaintiffs' property, which is currently found at a depth of approximately twenty-five feet below the surface of plaintiffs' property. The contamination cannot be seen, smelled, touched, nor is it otherwise disruptive, intrusive, dangerous, or harmful.

Here, defendant is and has been actively working to remediate the migration of contamination through the implementation of a CAP. Free product levels on defendant's land have gone from 3.4 feet to just a few inches and, within six months, contaminate levels in the groundwater under plaintiffs' property have already been reduced. While plaintiffs' property did have contamination, no actual free product or petroleum was detected there, and there were no risks to the health and safety of anyone due to the contamination. With regard to any actual damage caused and health risks posed by the amount of contamination on plaintiffs' property, the following direct examination of Thomas Moore, employee of DENR is illustrative:

> Q. But in general – how is the CAP performing today?
>
> . . .
>
> A. I feel like the strategy that was chosen by Terraquest [the environmental consulting agency hired by defendant to conduct the cleanup] is an appropriate strategy and that we are seeing the evidence of the clean up being effective.
>
> Q. Where is [plaintiffs'] well in relationship to the plume?
>
> A. The well, [plaintiffs'] well, is right here (indicating).
>
> Q. Do you know the depth of his well?
>
> A. I do not.
>
> Q. Do you know the death [sic] of the groundwater that has contaminants in it?
>
> A. The depth of the groundwater is about 25 to 30 feet. It is somewhere in there. It kind of fluctuates but that is generally the depth of it.
>
> Q. From your experience these levels of particulates that are in – that are listed on these two tables, how would you describe those level's [sic]?

A. In reference to both properties?

Q. In reference to – on the [plaintiffs'] property?

A. The contamination that we're seeing on the [plaintiffs'] property is, in our view, not significant. That does not mean there is not contamination there it just means it is not significant enough for us to directly provide a remediation strategy for it.

Q. Is any human being coming into contact with any of those petroleum constituents that are listed on these tables?

. . .

A. Not that I'm aware of. I know the water supply well did have a few detections in it but they were deemed by our state epidemiologist not to be a health risk.

. . .

Q. Is there anything in the regulations that requires [defendant] to actively remediate on the [plaintiffs'] property?

A. If they had levels that were considered above gross contaminant levels we would – we would require them to do additional work. I don't know that it specifically stated that in the regulations but we would consider that significant enough that we would require them to go on [plaintiffs'] property and clean up – do some additional active clean up.

Q. Did you find that in this situation?

A. I did not.

On cross-examination, plaintiff Kelley testified that, after filtration, he continues to drink the well water on his property every day. He also continues to bring his children to the property regularly. Plaintiff Kelley further testified that he can continue to use his property as he has always used it in the past[6]:

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6. It is worth noting that heretofore all cases involving leaking USTs in North Carolina dealt with property where the potable well was contaminated to at least a noticeable and/or dangerous level and where most parties with contaminated water were specifically advised not to drink or otherwise use their water. *Wilson v. McLeod Oil Co.*, 327 N.C. 491, 503, 398 S.E.2d 586, 591 (1990) (involving well water contaminated with gasoline

> Q. Up until you received this letter from [DENR] in November of 2010, did you ever have any issues with your water tasting like gasoline?
>
> A. No.
>
> Q. Have you ever had any issues with the water tasting like gasoline?
>
> A. No.
>
> Q. Anybody ever complained about the quality of your water?
>
> A. No.

Plaintiffs mainly take issue with the fact that all active remediation is taking place solely on defendant's property while no active remediation is taking place on plaintiffs' property. It is primarily for this reason, plaintiffs argue, that plaintiffs should be awarded reparation costs so plaintiffs may clean their property in a manner of their choosing, rather than having to rely on the beneficial, collateral effects of defendant's cleanup efforts on defendant's property. Specifically, plaintiffs requested $1,131,000.00 to conduct their own, separate cleanup, pursuant to a plan recommended by their environmental engineer, Raymond. Raymond proposed chemical oxidation and a groundwater barrier remediation system and proposed drilling injection wells—a process requiring state approval that plaintiff had not yet sought from DENR

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which plaintiffs noticed smelled like gasoline); *Lancaster v. N.C. Dep't of Env't & Natural Res.*, 187 N.C. App. 105, 106, 652 S.E.2d 359, 360 (2007) (involving an action where well water "tests revealed high levels of benzene and other gasoline constituents"); *Hodge v. Harkey*, 178 N.C. App. 222, 223, 631 S.E.2d 143, 144 (2006) (noting that, in ordering the defendants/responsible parties to take action with respect to the contamination on plaintiffs' property, defendants were *ordered* by DENR to construct a new water supply well for plaintiffs and defendant additionally provided bottled water during the interim); *Ellington v. Hester*, 127 N.C. App. 172, 173, 487 S.E.2d 843, 844 (1997) (involving a contamination case where "plaintiffs noticed that their drinking water had a foul odor and a bad taste and the plaintiffs developed skin irritations from contact with the water"); *Crawford v. Boyette*, 121 N.C. App. 67, 69, 464 S.E.2d 301, 303 (1995) (involving well water contamination where plaintiff was warned that, based on the water's benzene level, the "water should not be used for drinking or cooking. Prolonged bathing/showering should be avoided"); *James v. Clark*, 118 N.C. App. 178, 180, 454 S.E.2d 826, 827 (1995) (noting that plaintiffs alleged "problems with their well water, including bad taste and other physical signs" of contamination from gasoline); *Jordan*, 116 N.C. App. at 158, 447 S.E.2d at 493 ("Any continued water use from this well for *any* purposes may pose a significantly increased long-term cancer risk. It is strongly recommended that all use of water from this well be discontinued immediately.").

and, therefore, had not obtained. While plaintiffs' proposed plan would take place actively on plaintiffs' property, and is purported to be able to clean the property more quickly, admittedly, it is a method that is infrequently, if ever, used in North Carolina. Plaintiffs' argument as to the need for active remediation on its property is not persuasive.

Plaintiffs also argue that the "personal reasons" exception allows plaintiffs to recover the full restoration costs even if those costs exceed diminution in value. As stated previously, when a landowner wishes to continue use of contaminated property for personal purposes, even restoration costs exceeding the land's value may be deemed equitable. *Plow*, 57 N.C. App. at 162–63, 290 S.E.2d at 789. The trial court found conclusively, however, that the "personal use doctrine" would not apply in this case because plaintiffs are corporations, and the property is being used for business purposes or the production of profit or pecuniary gain, not as a homestead or for other individual uses or for the enjoyment of the public. We agree.

Plaintiff argues that the fact that plaintiffs are corporations does not automatically disqualify them from having personal reasons to want to restore their property. Plaintiff cites several cases from other jurisdictions in support of this proposition. *See Alaska Greenhouses*, 517 P.2d at 1387 (awarding restoration damages to a plaintiff corporation which planned to develop the damaged property as a nursery with greenhouses); *Roman Catholic Church of Archdiocese of New Orleans v. La. Gas Serv. Co.*, 618 So.2d 874, 880 (La. 1993) (awarding full restoration damages where the Church operated an apartment complex on the damaged property); *Sunburst*, 338 Mont. at 287–88, 165 P.3d at 1098 (awarding full restoration damages in a case brought by a school district and numerous homeowners following the explosion of a residence and contamination of residences with a known carcinogen).

Plaintiffs' case is highly distinguishable from the cases cited above. Plaintiffs' first argument with regard to the personal use exception is that plaintiffs' corporations are for all practical purposes the alter ego of one individual, Brad Kelley. Kelley is the sole shareholder and president of both corporations, BSK and Brad Kelley Enterprises. Kelley is BSK's only employee and Brad Kelley Enterprises has approximately five employees. Kelley contends that his primary reason for buying the property at issue was because of its location and proximity to his home and his children's school and because it suited his needs for his coffee and water business. Plaintiff Kelley attests that, as a single parent, he frequently picks his daughters up from school and brings

them to work for supervision until his work ends. These reasons are unpersuasive for application of the "personal use" doctrine.

Notably, both *Sunburst* and *Roman Catholic Church* involved restoration awards for damage to or destruction to residences—places where individuals actually lived. *See Roman Catholic Church*, 618 So.2d at 875–76; *Sunburst*, 338 Mont. at 272, 165 P.3d at 1088. Even though corporations or businesses were involved in the separate actions (in *Sunburst*, a school district, and in *Roman Catholic Church*, a church), the ultimate damage in the above cases was done to personal residences.

Here, Plaintiff Kelley's statement that his work is close to his home and that his children come to the property after school in no way establishes plaintiffs' property as a "homestead" for purposes of application of the "personal use" doctrine. Plaintiffs have offered no evidence to suggest that Plaintiff Kelley and his children live on or have ever resided on the property at issue. Rather, the trial court found that plaintiffs are corporations and the property is being used for business purposes or for pecuniary gain, and we agree with the trial court's conclusion that the "personal use" doctrine does not apply.

The *Alaska Greenhouses* case is distinguishable from the other two cases mentioned above, in that restoration damages were awarded to a plaintiff—a family business, which intended to develop the property for horticultural purposes—following excavation projects and the rerouting of a creek by adjoining landowners, defendant corporations, which caused numerous trespasses on the plaintiff's property, extensive damages to trees and ground cover, and erosion. 517 P.2d at 1381. In *Alaska Greenhouses* there was no discussion of the personal use doctrine; the Alaska Supreme Court simply found that a restoration damage award of $50,000.00 per acre where the plaintiff paid only $4,000.00 per acre was not in error. *Id.* at 1387. This Alaska state case has no binding authority on this Court. Moreover, where the court did not address the issue before us regarding the personal use doctrine, there can be nothing persuasive in such a case that lacks any analogous reasoning to the instant case.

We find that none of the above cases support plaintiffs' argument that restoration damages in the amount of $1,492,000.00 are appropriate in this case. While defendant has admitted that it caused the release of petroleum products into the groundwater on defendant's property, which in turn migrated onto plaintiffs' property and contaminated it, there has been no substantial interference with plaintiffs' use of the property. The migration of the dissolved phase plume from defendant's property to plaintiffs' property is a trespass and nuisance that

does give rise to liability. However, despite the current remediation already taking place, plaintiff Kelley's sole concern was just to have the property cleaned quickly:

> Q. . . . [W]hat was your primary concern?
>
> A. With the contamination?
>
> Q. Yes, sir.
>
> A. My primary concern is getting it cleaned up.
>
> Q. Do you have any concerns about the clean up [sic] plan proposed – excuse me the present clean up [sic] plan, a [CAP]?
>
> A. Yeah.
>
> Q. What are your concerns?
>
> A. Again, as I stated it has been years and years and nothing has been done. I mean there's no clean up going to happen on my property, according to my understanding of that plan. They are only proposing to clean up their property and that hasn't even started and it has been years and years, so I don't know if that is ever going to start. Is it going to start, stop, I just don't know. I'm just kind of stuck.

Plaintiff Kelley references no damage that interferes with his ability to conduct his business on the property. In fact, plaintiffs had no knowledge of contamination of the groundwater until 8 November 2010, when Terraquest circulated a well survey.

Nowhere in our jurisprudence is it stated that we are required to accept plaintiffs' evidence that a certain amount is required for replacement or remediation when that amount is not reasonable. The *Restatement (Second) of Torts* § 929 states in pertinent part:

> (1) If one is entitled to a judgment for harm to land resulting from a past invasion and not amounting to a total destruction of value, the damages include compensation for
>
> (a) the difference between the value of the land before the harm and the value after the harm, or at his election *in an appropriate case*, the cost of

> restoration that has been or may be reasonably incurred . . . .

Restatement (Second) of Torts § 929(1)(a) (emphasis added); *see also Phillips*, 231 N.C. at 571, 58 S.E.2d at 347 ("[The diminution-in-value] rule, *which can be an approximation to truth in a limited number of cases*, is often too remote from the factual pattern of the injury and its compensable items to reflect the fairness and justice which the administration of the law presupposes. For that reason it is applied with caution, and often with modifications designed to relax its rigidity and fit it to the facts of the particular case." (emphasis added)).

This is not "an appropriate case" for awarding cost of restoration damages. Plaintiffs' alleged costs of remediation and the jury's finding regarding costs of remediation are not reasonable under the circumstances.

Comment b on Subsection (1), Clause (a), of section 929 of the Restatement also states that

> [i]f . . . the cost of replacing the land in its original condition is disproportionate to the diminution in value of the land caused by the trespass, unless there is a [personal reason to restore], damages are measured only by the difference between the value of the land before and after the harm.

Restatement (Second) of Torts § 929(1)(a) cmt. b. The cost of replacing plaintiffs' land in its original condition, based on plaintiffs' cleanup plan and the jury award— $1,492,000.00—is more than thirteen times the diminution in value as found by the jury—$108,500.00. The trial court's determination that not only is this award disproportionate, as no personal use exception applies, but the award is also unreasonable under the circumstances, is supported by the record.

We hold that where no personal use exception applies, and the cost of remediation to property is disproportionate to or greatly exceeds the diminution in value of the property or is otherwise unreasonable under the circumstances, the cost awarded should be the diminution in value of the property. *See Restatement (Second) of Torts* § 929(1)(a) cmt. b. Accordingly, the trial court's post-verdict order entering a judgment in favor of plaintiffs for damages for nuisance, trespass, and violation of OPHSCA in the amount of $108,500.00 was not erroneous.

Defendant's Appeal

I

[2] On cross-appeal, defendant first argues that the trial court erred in not dismissing plaintiffs' claims because the court lacked subject matter jurisdiction. Specifically, defendant argues that plaintiffs lack standing to bring an action to remediate groundwater contamination because groundwater is a public resource belonging to the State and is therefore not plaintiffs' private property. We disagree.

Standing refers to whether a party has a sufficient stake in a controversy so as to properly seek adjudication of the matter. *Neuse River Found. v. Smithfield's Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 51–52 (2002). Additionally, "[s]tanding is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Id.* at 113, 574 S.E.2d at 51.

With regards to the preservation of natural resources, the North Carolina Constitution states, in pertinent part, that:

> [i]t shall be the policy of this State to conserve and protect its land and waters for the benefit of its citizenry, and to this end it shall be a proper function of the State of North Carolina and its political subdivisions to acquire and preserve park, recreational, and scenic areas, to control and limit the pollution of our air and water . . . .

N.C. Const. art. XIV, § 5. In affirming the State's stewardship of water as a public resource, the legislature enacted N.C. Gen. Stat. § 143-211(a):

> Recognizing that the water and air resources of the State belong to the people, the General Assembly affirms the State's ultimate responsibility for the preservation and development of these resources in the best interest of all its citizens and declares the prudent utilization of these resources to be essential to the general welfare.

N.C. Gen. Stat. § 143-211(a) (2013).

North Carolina has long held that water is a usufruct, which is the right to use water but not possess it. *Walton v. Mills*, 86 N.C. 280, 282 (1882) ("[One] has no property in the water itself, but a simple usufruct while it passes along."). North Carolina thus adheres to the "American Rule" of water use where the landowner has "the right only to a reasonable and beneficial use of the waters upon the land or its percolations or to some useful purpose connected with his occupation and enjoyment."

Bayer v. Nello L. Teer Co., 256 N.C. 509, 516, 124 S.E.2d 552, 556 (1992) (citation omitted).

North Carolina's adherence to the American Rule notwithstanding, the North Carolina Supreme Court has held that:

> the right to have a natural water course continue its physical existence upon one's property is as much property as is the right to have the hills and forests remain in place, and while there is no property right in any particular particle of water or in all of them put together, a riparian proprietor has the right of their flow past his lands for ordinary domestic, manufacturing, and other lawful purposes, without injurious or prejudicial interference by an upper proprietor.

Hampton v. N.C. Pulp Co., 223 N.C. 535, 547, 27 S.E.2d 538, 546 (1943) (holding that the plaintiff had standing to sue where plaintiff owned a fishery business on a river and pollution from a pulp mill "destroyed or diverted the run of the fish so as to seriously injure or destroy [the plaintiff's] business and diminish the value of his riparian property"). Furthermore, *Webster's Real Estate Law in North Carolina* defines "land" as follows:

> "Land" thus extends to include (1) the soil; (2) things growing naturally on the soil; (3) *the minerals and waters beneath the surface of the soil*; (4) the airspace that is above the soil so far as it may be reasonably reduced to possession and so far as it is reasonably necessary for the use and enjoyment of the surface . . . .

1-1 *Webster's Real Estate Law in North Carolina* § 1.07 (2013) (emphasis added).

Finally, OPHSCA holds polluters strictly liable for damages resulting from contamination of waters within the State and, additionally, OPHSCA was not intended "to limit any right or remedy available to a third party under any other provision of law." N.C.G.S. § 143-215.94B(b3).

Here, there is no dispute that plaintiffs owned the property at issue located at 4995 Reynolda Road, Winston-Salem, North Carolina. While it may be true that plaintiffs do not own outright the groundwater below their property, plaintiffs as landowners have "the right . . . to . . . the use of the waters upon the land or its percolations." *Bayer*, 256 N.C. at 516, 124 S.E.2d at 556. As such, plaintiffs had standing to bring an action

against defendant for alleged trespass or damage caused to the groundwater beneath plaintiffs' land.

Based on the statutory authority conferred on the courts by OPHSCA, which creates a private cause of action for plaintiffs pursuant to N.C.G.S. § 143-215.94B(b3), and plaintiffs' allegations regarding contamination to groundwater under land which plaintiffs owned and which plaintiffs had a legal right to use, plaintiffs had standing to sue and the trial court had subject matter jurisdiction under OPHSCA, as well as under the common law actions of trespass and nuisance.

II

[3] Defendant next argues that the trial court erred in submitting the damages issue related to diminution in value to the jury and omitting duty to mitigate instructions because plaintiffs refused to connect to municipal water. We disagree.

A request for a specific jury instruction must be submitted to the court in writing. N.C. Gen. Stat. § 1-181(a)(1) (2015). When a party requests a specific jury instruction, it should be given when " '(1) the requested instruction was a correct statement of law and (2) was supported by the evidence, and that (3) the instruction given, considered in its entirety, failed to encompass the substance of the law requested and (4) such failure likely misled the jury.' " *Outlaw v. Johnson*, 190 N.C. App. 233, 243, 660 S.E.2d 550, 559 (2008) (quoting *Liborio v. King*, 150 N.C. App. 531, 534, 564 S.E.2d 272, 274 (2002)). "[W]here the request for a specific instruction raises a question of law, 'the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court.' " *State v. Edwards*, ___ N.C. App. ___, ___, 768 S.E.2d 619, 620 (2015) (quoting *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009)).

Here, defendant submitted in writing to the court a proposed jury instruction on the duty to mitigate. During the charge conference, the trial court noted that the duty to mitigate issue was ruled on during pretrial conference, and the trial court again denied defendant's motion for the proposed duty to mitigate instruction. Defendant proposed the duty to mitigate instruction based on plaintiffs' failure to connect to city water.

Part 2A of OPHSCA, titled "Leaking Petroleum Underground Storage Tank Cleanup," includes subsection (b3), which states the following: "This subsection shall not be construed to require a third party to connect to a public water system. Except as provided by this subsection, *connection to a public water system does not constitute cleanup* under

Part 2 of this Article . . . .” N.C.G.S. § 143-215.94B(b3) (emphasis added). Because connection to city water, pursuant to the language of the statute, does not constitute cleanup, it is unclear, then, how connection to city water would have mitigated plaintiffs' damages.

Despite the language in subsection (b3), defendant's sole argument in support of its proposed duty to mitigate instruction is that plaintiffs' refusal to connect to city water “reveals that the true motivation here is increasing [plaintiffs'] monetary award, not preventing personal injury, inconvenience, interference, or curing the property's condition . . . .” Defendant offers no other evidence, other than plaintiffs' failure to connect to city water, which is specifically categorized by statute as not constituting cleanup, in support of its proposed duty to mitigate instruction. Therefore, the trial court did not err in denying defendant's proposed instruction, as there was not enough evidence, if any at all, presented at trial to support such an instruction. Accordingly, defendant's argument on this point is overruled.

III

[4] Next, defendant argues that the trial court erred in awarding damages for diminution in value related to stigma.[7] Defendant argues that allowing plaintiffs to recover the diminution in value would constitute a double recovery for plaintiffs since the cleanup process is currently ongoing. For the following reasons, we disagree.

North Carolina law bars recovery for stigma damages when damages relate to temporary or abatable nuisances. *Rudd v. Electrolux Corp.*, 982 F. Supp. 355, 372 (M.D.N.C. 1997); *see also Appeal of Camel City Laundry Co.*, 123 N.C. App. 210, 215–16, 219, 472 S.E.2d 402, 406, 408 (1996) (affirming the calculation of the “impaired value” of property, which included factoring in stigma associated with the property's contamination and remediation efforts).

Defendant argues that the award of $108,500.00 to plaintiffs constitutes stigma damages because it relates to a temporary, abatable nuisance that is currently being remedied and that, therefore, any diminution in value to plaintiffs' property is temporary. In other words, defendant contends, the diminution in value of plaintiffs' property is related to the stigma associated with the contamination on the property, despite

7. Stigma damages are “[d]amages resulting from a temporary harm that causes the fully restored property to be viewed as less valuable after the harm and produces a permanent loss of value.” They are also referred to as “diminution damages.” Black's Law Dictionary (10th ed. 2014).

the fact that the contamination is currently being remediated pursuant to a state-approved plan.

Here, the trial court determined that plaintiffs' property's contamination, such as it is, is a "temporary or abatable nuisance." However, defendant mischaracterizes the trial court's measure of damages as awarded. Nowhere in the post-verdict order does the trial court indicate that the measure of damages as calculated involved factoring in stigma related to the property's contamination, nor does the trial court characterize or otherwise denominate the damage award as damages in value related to stigma. Rather, the trial court entered a judgment for "damages as a result of nuisance, trespass, and violation of [OPHSCA]." Additionally, defendant's proposed jury instruction regarding damages related to stigma was denied by the trial court. As the jury was not instructed on damages related to stigma, the jury's verdict could not have reflected an award of stigma damages. Accordingly, defendant's argument on this point is also overruled.

IV

[5] Finally, defendant argues that the trial court erred in denying defendant's motion for JNOV as plaintiffs' nuisance and trespass claims fail as a matter of law absent real and substantial interference. Specifically, defendant argues that, because plaintiffs presented no evidence that the nuisance and trespass of the contaminated groundwater caused any actual injury to person or property, or that the contamination interfered with plaintiffs' use of their property, damages cannot be awarded. We disagree.

"Generally, when there is more than a scintilla of evidence to support a nonmovant's claim or defense, a motion for . . . judgment notwithstanding the verdict should be denied." *N.C. Indus. Capital, LLC v. Clayton*, 185 N.C. App. 356, 362–63, 649 S.E.2d 14, 20 (2007) (citation omitted).

A claim for trespass may be brought under North Carolina law for the migration of oil from the defendant's property onto the property of the plaintiff based upon a violation of N.C. Gen. Stat. § 143-215.93 (OPHSCA). *Jordan*, 116 N.C. App. at 166–67, 447 S.E.2d at 497–98. "The elements for a trespass caused by leaking hazardous substances are as follows: (1) plaintiff was in possession of the property; (2) the defendant himself, or an object under his control, voluntarily entered, caused to enter, or remained present upon plaintiff's property; and, (3) the entry was unauthorized." *Rudd*, 982 F. Supp. at 370 (citing *Jordan*, 116 N.C. App. at 166, 447 S.E.2d at 498)). To recover for nuisance, a plaintiff

must show an unreasonable interference with the use and enjoyment of his property. *Jordan*, 116 N.C. App. at 167, 447 S.E.2d at 498 (citation omitted). Additionally, a nuisance "must affect the health, comfort or property of those who live near [it]. It must work some substantial annoyance, some material physical discomfort to the plaintiffs, or injury to their health or property." *Pake v. Morris*, 230 N.C. 424, 426, 53 S.E.2d 300, 301 (1949).

Here, defendant has admitted that it caused the release of petroleum products into the groundwater on defendant's property, which in turn migrated onto plaintiffs' property and contaminated it. Plaintiffs have installed a filtration system on their drinking water well and numerous monitoring wells have been drilled on plaintiffs' property by defendant. Crews also come onto plaintiffs' property to routinely monitor those wells.

Defendant seems to argue that substantial injury to plaintiffs' health or property is required to sustain a claim of nuisance; however, the substantial annoyance (and discomfort) to which plaintiffs testified provides more than a "scintilla of evidence" in support of the trial court's denial of defendant's JNOV:

> Q. Tell me a little bit about how the water sampling well situation worked when they put them in.
>
> A. It was – I don't think they did them all at one time but they would show up with quite a few trucks and drill rigs and come out there and drill holes and the piping and things like down into the ground. They put some concrete where the holes are, the caps. They would do that and let them set up for a couple of days, come back. I don't know what else they were doing out there.
>
> Q. Did that interfere with your business at all?
>
> A. It was inconvenient. We had to stay out of their way, move trucks around, things like that, couldn't park in certain areas.
>
> Q. Did it ever prevent your office from working on certain days?
>
> A. There were a few times when they were drilling and it was so loud that we couldn't hear the phones and things so I sent the people out of the office.
>
> . . .

> Q. How often did that occur?
>
> A. A hand full of times. Just basically when they were drilling with the rigs.
>
> Q. Have you done anything – you guys are on – are you on city water or well water?
>
> A. We're still on well water.
>
> Q. Have you done anything to the well water since all this took place?
>
> A. We have a filtration system in place now.
>
> Q. What kind of filtration system?
>
> A. It's a carbon block filtration system and then we have another one in the interior office too that is a multi-stage filtration system.

While it is true that trespass of the contamination to plaintiffs' groundwater did not cause any actual injury to person or property, effects of the contamination—well drilling—did interfere with the use of plaintiffs' property. Plaintiffs' business has been able to operate, for the most part, as it did before the presence of contamination, and plaintiffs continue to drink the well water. However, there was testimony regarding substantial annoyance and some interference with comfort and use of the property as well as the need for filtration. Therefore, there is more than a "scintilla of evidence" to support plaintiffs' claim for trespass and nuisance, and thus, denial of defendant's motion for judgment notwithstanding the verdict was proper based on this record. Accordingly, defendant's argument is overruled.

We find that the trial court (I) did not err in holding that the damages necessary to remediate the contamination of plaintiffs' property were capped at $108,500.00; (II) had subject matter jurisdiction because plaintiffs had standing to bring an action to remediate groundwater contamination; (III) did not err in refusing to give a duty to mitigate instruction; (IV) did not err with regard to its damages award because damages were not related to stigma; and (V) did not err in denying defendant's motion for JNOV because plaintiffs' claims for trespass and nuisance did not fail as a matter of law.

AFFIRMED.

Judges CALABRIA and ZACHARY concur.

BEAUFORT BUILDERS, INC., PLAINTIFF
v.
WHITE PLAINS CHURCH MINISTRIES, INC., DEFENDANT

WHITE PLAINS CHURCH MINISTRIES, INC., DEFENDANT AND THIRD-PARTY PLAINTIFF
v.
CHARLES F. CHERRY, THIRD-PARTY DEFENDANT

No. COA15-582

Filed 1 March 2016

Construction Claims—foundation built too low—claim against construction company president individually—economic loss rule

Where a construction company contracted with a church to construct a new building and the company poured the building's foundation lower than permissible under federal regulations, resulting in the church being unable to obtain a certificate of occupancy, the trial court did not error by granting the motion notwithstanding the verdict of Cherry, the company's president, concluding that the church was precluded from recovering on a theory of negligence from the Cherry individually. The economic loss rule "prohibits recovery for pure economic loss in tort, as such claims are instead governed by contract law," and none of the four exceptions applied to this case—the promisee suffered the injury; the injury occurred to the subject matter of the contract; the construction company was not acting as a bailee, common carrier, or in any such similar capacity; and there was no evidence of willfulness or conversion.

Appeal by defendant and third-party plaintiff from amended judgment entered 28 October 2014 by Judge Wayland J. Sermons, Jr. in Beaufort County Superior Court. Heard in the Court of Appeals 4 November 2015.

Ragsdale Liggett PLLC, by William W. Pollock and Amie C. Sivon, for plaintiff-appellee Beaufort Builders, Inc. and third-party defendant-appellee Charles F. Cherry.

White & Allen, P.A., by John P. Marshall, E. Wyles Johnson, Jr., and Ashley F. Stucker, for defendant-appellant and third-party plaintiff-appellant White Plains Church Ministries, Inc.

DAVIS, Judge.

White Plains Church Ministries, Inc. ("White Plains") appeals from the trial court's amended judgment granting the motion of Charles F. Cherry ("Cherry") for judgment notwithstanding the verdict. On appeal, White Plains contends that the trial court erred by determining that it was precluded from recovery on a theory of negligence against Cherry individually as president of Beaufort Builders, Inc. ("Beaufort Builders") for economic injury resulting from the construction of a building that was the subject of a contract between White Plains and Beaufort Builders. After careful review, we affirm.

Factual Background

On 23 May 2011, Beaufort Builders and White Plains entered into a written contract ("the Contract") pursuant to which Beaufort Builders agreed to construct a church ("the Church") on land owned by White Plains in Belhaven, North Carolina in Beaufort County. Cherry and his wife are the co-owners of Beaufort Builders, and Cherry serves as the company's president.

As part of the construction of the Church, it was necessary to pour a concrete "pad" foundation upon which the actual structure would be built. Due to the low elevation in the Belhaven area, Federal Emergency Management Agency ("FEMA") regulations required the pad foundation for the Church to be built above the base flood elevation ("BFE"), which was set at seven feet in that part of Beaufort County. In order to ensure that the foundation was compliant, White Plains hired Ralph Jarvis ("Jarvis"), a surveyor, to determine the elevation at the building site. In the course of performing this task, Jarvis inserted a metal pole into the ground at the building site and marked it at an elevation of eight feet — one foot higher than necessary for compliance with the seven-foot BFE. Based on his survey, Jarvis obtained an elevation certificate reflecting that the mark he had made at the site was, in fact, set at eight feet.

Cherry testified that in preparation for the pouring of the pad foundation, Pat Harrington ("Harrington") and Dave Saul, two individuals who were working under Cherry's direction on the building project, used a bulldozer to move dirt off of the site of the foundation to an area that was ultimately going to be used for the parking lot of the Church. Cherry elaborated on this issue as follows:

Q. Who actually removed the dirt?

> A. Mr. Harrington and Dave Saul they worked together and he was actually the one on the site. They would do this because the grader was still on the site. He removed it.
>
> Q. Did you personally ever remove any dirt off this pad?
>
> A. No.
>
> Q. Did you ever do any grading outside the pad?
>
> A. I did.
>
> Q. What grading did you do outside the pad?
>
> A. The dirt they had pushed off the pad into the parking lot. You're looking at 4' of dirt. They pushed all that dirt off so that it was just above so it was just above — had some steep places on it and we grade that we could work [sic]. We could get on the site properly. You know drive up without somebody getting hurt. The hurricane came shortly after that. There was a lot of water that washed and eroded some. We did grade that up on the actual side of the pad.
>
> Q. As far as the pad in the parking lot, you did not do that?
>
> A. No.
>
> Q. Okay. Now, during this time did you ever push off dirt from the pad to the parking lot?
>
> A. No. I did that to save time and the only reason I did that was to save the church money. . . . Dug some ditches, didn't have any. Had to get ready to pour a slab. . . . a foot below to where the water came up to on the site.

Cherry further testified that during a conversation with Reverend Douglas Cogdell ("Reverend Cogdell"), the senior pastor of White Plains, Reverend Cogdell had expressly given him permission to move the dirt from the foundation to the parking lot.

White Plains offered testimony from Gloria Rogers ("Rogers"), White Plains' administrative assistant, who recounted an occasion on which she had driven by the Church during its construction and observed Cherry moving dirt from the foundation.

> Q. You've been sitting in the courtroom for the last two and a half days, Ms. Rogers. You've heard this testimony, I take it, that about dirt being pushed off the mound?

A. Yes, sir.

Q. By Mr. Harrington onto the parking area?

A. Yes, sir.

Q. Separate from that, did you observe Mr. Cherry pushing dirt off the mound?

A. Yes, sir.

Q. Tell me about that.

A. My husband and I we rode by the church every day to see about the progress. And I saw Fred out with his truck, Mr. Cherry out with his truck. And I said, Mr. Cherry, what are you doing? And he says I'm pushing the dirt off of this mound because my men got to have some place to work. Because they say it's too muddy. It was really muddy. So, I've got to push the dirt off the mound. He was in -- in a big truck with the push thing that push [sic] the dirt out in front of it. And he was sitting in the middle of the mountain. As we set there he was pushing around -- he was pushing it systematically around the mound.

Q. Pushing the -- pushing the dirt --

A. Dirt off to the side.

Q. Off to the side.

A. All -- all around, you know, like pushing it around. He said he had to do that because his men needed to come to work and that it was too muddy and they got to get the steel frame up. The building was supposed to be coming in soon.

. . . .

Q. Ms. Rogers, did -- did Mr. Cherry tell you that the reason he was pushing dirt off the mound onto the muddy areas was because his workers told him that the ground was too muddy for them to work?

A. Yes, sir.

Q. And you -- I think you characterized the piece of machinery that he was atop as a truck with -- with some blade on the front?

> A. Yeah, it was a big, you know, truck that you push the dirt off. One of those big things that you push the dirt off with. I guess you use it to push the dirt off. He was pushing the dirt off.
>
> Q. Was it a truck or a tractor?
>
> A. It -- it wasn't a truck like -- it might have been a tractor. It wasn't a -- I don't know what you call it. It was big. It had a thing in the front of it and he as [sic] sitting on it.

Revered Cogdell also testified at trial. He denied ever giving Cherry permission to move dirt from the foundation site to the parking lot area.

Cherry and Harrington both testified that they relied upon the elevation certificate and Jarvis' on-site marking in order to determine how much of the dirt to move off of the foundation site. According to Cherry, Beaufort Builders believed that the foundation had been poured at seven and a half feet above sea level — half a foot above the BFE.

After the pad was poured, construction of the Church continued. When construction was substantially completed, White Plains hired Hood Richardson ("Richardson"), another surveyor, to perform a final evaluation of the building as a prerequisite to being awarded a certificate of occupancy by the county. Richardson's survey revealed that Jarvis had made an error in his initial calculations. In reality, the actual elevation of the foundation was only at 6.3 feet — approximately 8½ inches below the minimum elevation allowable per the applicable FEMA regulation. As a result, White Plains was unable to obtain a certificate of occupancy for the Church.

Upon failing to receive the certificate of occupancy, White Plains refused to pay Beaufort Builders the outstanding balance owed under the Contract. On 16 November 2012, Beaufort Builders filed a complaint in Beaufort County Superior Court alleging, *inter alia*, that White Plains had breached the Contract by failing to make the remaining payments required thereunder. On 4 February 2013, White Plains filed (1) an answer; (2) counterclaims for breach of contract, breach of implied warranty, and negligence; and (3) a third-party complaint against Cherry individually for negligence.

A jury trial was held before the Honorable Wayland J. Sermons, Jr. beginning on 21 July 2014. At the conclusion of the trial, the jury found that (1) White Plains breached the Contract; (2) Beaufort Builders did not breach the Contract; and (3) White Plains was damaged by

the negligence of Cherry.[1] On 14 August 2014, in accordance with the jury's verdict, the trial court entered a judgment awarding (1) Beaufort Builders $70,090.00 in damages for White Plains' breach of contract; and (2) White Plains $57,500.00 in damages for Cherry's negligence.

On 25 August 2014, Cherry filed a motion for judgment notwithstanding the verdict pursuant to Rule 50(b) of the North Carolina Rules of Civil Procedure. On 28 October 2014, the trial court granted Cherry's motion and entered an amended judgment providing, in pertinent part, that "Third-Party Defendant Charles F. Cherry is hereby adjudged to not be liable to Defendant/Third-Party Plaintiff White Plains Church Ministries, Inc. and the claim against Third-Party Defendant Charles F. Cherry is dismissed with prejudice[.]" White Plains filed a timely notice of appeal from the trial court's amended judgment on 25 November 2014.

Analysis

White Plains contends that the trial court erred in granting judgment notwithstanding the verdict in favor of Cherry on its third-party claim against him. We disagree.

> On appeal, the standard of review for a judgment notwithstanding the verdict is the same as that for a directed verdict, whereby this Court determines whether the evidence was sufficient to go to the jury. The standard is high for the moving party, as the motion should be denied if there is more than a scintilla of evidence to support the plaintiff's *prima facie* case. The evidence supporting the plaintiff's claims must be taken as true, and all contradictions, conflicts, and inconsistencies must be resolved in the plaintiff's favor, giving the plaintiff the benefit of every reasonable inference.

Scarborough v. Dillard's, Inc., 179 N.C. App. 127, 132, 632 S.E.2d 800, 803-04 (2006) (internal citations and quotation marks omitted). "However, when the evidence is legally insufficient to support a verdict for the prevailing party, and when the question has become one exclusively of law

1. It appears from the record that the only liability issues that were actually submitted to the jury were whether (1) White Plains breached the Contract by failing to make the payments provided for in the Contract; (2) Beaufort Builders "provide[d] labor and materials in the building of a church building to [White Plains] under such circumstances that [White Plains] should be required to pay for them"; (3) Beaufort Builders "breach[ed] the contract by failing to build the church building above the base flood elevation"; and (4) White Plains was "damaged by the negligence of . . . Cherry."

such that the jury has no function to serve, a motion for JNOV may be properly granted." *Primerica Life Ins. Co. v. James Massengill & Sons Const. Co.*, 211 N.C. App. 252, 266-67, 712 S.E.2d 670, 681 (2011) (internal citations, quotation marks, and brackets omitted).

It is well settled that "no negligence claim exists where all rights and remedies have been set forth in [a] contractual relationship." *Williams v. Houses of Distinction, Inc.*, 213 N.C. App. 1, 4, 714 S.E.2d 438, 440 (2011) (citation, quotation marks and brackets omitted); *see Mason v. Yontz*, 102 N.C. App. 817, 818, 403 S.E.2d 536, 538 (1991) ("Generally, a breach of contract does not give rise to damages based on a negligence method of recovery even where the breach was due to negligence or lack of skill." (citation and quotation marks omitted)). This principle is known in our caselaw as the "economic loss rule."

> Simply stated, the economic loss rule prohibits recovery for purely economic loss in tort, as such claims are instead governed by contract law. . . . Thus, the rule encourages contracting parties to allocate risks for economic loss themselves, because the promisee has the best opportunity to bargain for coverage of that risk or of faulty workmanship by the promisor. For that reason, a tort action does not lie against a party to a contract who simply fails to properly perform the terms of the contract, even if that failure to perform was due to the negligent or intentional conduct of that party, when the injury resulting from the breach is damage to the subject matter of the contract. It is the law of contract and not the law of negligence which defines the obligations and remedies of the parties in such a situation.

Lord v. Customized Consulting Specialty, Inc., 182 N.C. App. 635, 639, 643 S.E.2d 28, 30-31 (citation and alteration omitted), *disc. review denied*, 361 N.C. 694, 652 S.E.2d 647 (2007).

The economic loss rule was first recognized by our Supreme Court in *N.C. State Ports Authority v. Lloyd A. Fry Roofing Co.*, 294 N.C. 73, 240 S.E.2d 345 (1978). In *Ports Authority*, the plaintiff entered into a contract with Dickerson, Inc. ("Dickerson"), a general contractor, for the construction of two buildings. *Id.* at 81, 240 S.E.2d at 350. However, due to their improper installation, the roofs leaked, resulting in damage to the buildings. As a result, the plaintiff sued Dickerson on theories of breach of contract and negligence. *Id.*

The Supreme Court held that the plaintiff was precluded from bringing an action in negligence against Dickerson, holding that "[o]rdinarily, a breach of contract does not give rise to a tort action by the promisee against the promisor." *Id.* The Court articulated four exceptions to this rule:

> (1) The injury, proximately caused by the promisor's negligent act or omission in the performance of his contract, was an injury to the person or property of someone other than the promisee.
>
> (2) The injury, proximately caused by the promisor's negligent, or wilful, act or omission in the performance of his contract, was to property of the promisee other than the property which was the subject of the contract, or was a personal injury to the promisee.
>
> (3) The injury, proximately caused by the promisor's negligent, or wilful, act or omission in the performance of his contract, was loss of or damage to the promisee's property, which was the subject of the contract, the promisor being charged by law, as a matter of public policy, with the duty to use care in the safeguarding of the property from harm, as in the case of a common carrier, an innkeeper or other bailee.
>
> (4) The injury so caused was a wilful injury to or a conversion of the property of the promisee, which was the subject of the contract, by the promisor.

Id. at 82, 240 S.E.2d at 350-51 (internal citations omitted).

Applying these principles, the Court concluded that none of these exceptions were applicable to the plaintiff's claim against Dickerson.

> In the present case, according to the complaint, Dickerson contracted to construct buildings, including roofs thereon, in accordance with agreed plans and specifications. It is alleged that Dickerson did not so construct the roofs. If that be true, it is immaterial whether Dickerson's failure was due to its negligence, or occurred notwithstanding its exercise of great care and skill. In either event, the promisor would be liable in damages. Conversely, if the roofs, as constructed, conformed to the plans and specifications of the contract, the promisor, having fully performed his

> contract, would not be liable in damages to the plaintiff even though he failed to use the degree of care customarily used in such construction by building contractors. Thus, the allegation of negligence by Dickerson in the second claim for relief set forth in the complaint is surplusage and should be disregarded. Consequently, the only basis for recovery against Dickerson, alleged in the complaint, is breach of contract and the Court of Appeals was in error in its view that the complaint "alleges an action in tort" against Dickerson.

Id. at 83, 240 S.E.2d at 351.

Since *Ports Authority* was decided, our appellate courts have applied the economic loss rule on a number of occasions to reject analogous negligence claims. *See Williams*, 213 N.C. App. at 6, 714 S.E.2d at 441-42 (economic loss rule precluded negligence claim by homeowners against builder where construction contract set forth available remedies and *Ports Authority* exceptions were inapplicable); *Land v. Tall House Bldg. Co.*, 165 N.C. App. 880, 882-83, 602 S.E.2d 1, 3 (2004) (economic loss rule barred negligence action by homeowners against contractor based on existence of construction contract between the parties); *Kaleel Builders, Inc. v. Ashby*, 161 N.C. App. 34, 42, 587 S.E.2d 470, 476 (2003) ("In accord with the Supreme Court's and our analysis in prior cases, we acknowledge no negligence claim where all rights and remedies have been set forth in the contractual relationship."), *disc. review denied*, 358 N.C. 235, 595 S.E.2d 152 (2004).

We find *Ports Authority* and its progeny controlling here. None of the four exceptions enumerated in *Ports Authority* exist in the present case. Here, the promisee to the contract (White Plains) — rather than a third-party — suffered the injury at issue. Moreover, the injury was to the Church, the subject matter of the Contract. Nor was Beaufort Builders acting as a bailee, a common carrier, or in any other capacity by which it was charged by law to use due care in order to protect White Plains' property from harm. Finally, there was no evidence suggesting that the injury to the property was willful or that there was a conversion of White Plains' property by Beaufort Builders.

White Plains attempts to escape the applicability of the economic loss rule by arguing that the Contract did not specifically authorize Cherry to move dirt from the site of the foundation to the parking lot. However, White Plains is not contending that through his removal of the dirt Cherry damaged the parking lot area or some other portion of White

Plains' property. Rather, the essence of White Plains' third-party claim is that because of his removal of the dirt from the site of the foundation the Church was built below the BFE and, as a result, White Plains was unable to obtain a certificate of occupancy for the building. Thus, the only injury claimed by White Plains as a result of Cherry's actions is directly encompassed within the subject matter of the Contract. *See Spillman v. Am. Homes of Mocksville, Inc.*, 108 N.C. App. 63, 65, 422 S.E.2d 740, 741-42 (1992) ("[A] tort action does not lie against a party to a contract who simply fails to properly perform the terms of the contract, even if that failure to properly perform was due to the negligent or intentional conduct of that party, when the injury resulting from the breach is damage to the subject matter of the contract.").

White Plains relies heavily on our decision in *White v. Collins Bldg., Inc.*, 209 N.C. App. 48, 704 S.E.2d 307 (2011), for the proposition that it is entitled to "pierce the corporate veil" of Beaufort Builders and recover on a claim of negligence against Cherry individually. But *White* is distinguishable on its face because the facts in that case did not trigger the economic loss rule.

In *White*, the plaintiffs purchased a home from a developer, AEA & L, LLC ("AEA"). The home had been constructed by a general contractor — Collins Building, Inc. ("Collins Building") — that had been hired by AEA and with whom the plaintiffs were not in contractual privity. Collins Building's sole shareholder and president was Edwin Collins ("Collins"). *Id.* at 49, 704 S.E.2d at 308. Upon moving into the home, the plaintiffs discovered several defects regarding the installation of the windows and doors as well as the piping, and four of the water pipes in the home later burst, resulting in significant property damage. *Id.* at 49-50, 704 S.E.2d at 308-09.

The plaintiffs brought negligence claims against AEA, Collins Building, Collins individually, and the plumbing subcontractors hired by Collins. *Id.* at 49, 704 S.E.2d at 308. The trial court dismissed the plaintiffs' claim against Collins. *Id.* On appeal, Collins maintained that the plaintiffs could not bring an action in negligence against him individually because "any action that he took was done on behalf of, and as an agent for, Collins Building." *Id.* at 51, 704 S.E.2d at 310.

We reversed the trial court's dismissal of the claim against him, noting that "[i]t is well settled that an individual member of a limited liability company or an officer of a corporation may be individually liable for his or her own torts, including negligence." *Id.* We then recognized that the plaintiffs had alleged Collins oversaw and personally supervised

the day-to-day construction of the house. *Id.* at 55-56, 704 S.E.2d at 312. We concluded that these allegations were sufficient to state a claim for negligence against Collins individually, holding that "the potential for corporate liability, in addition to individual liability, does not shield the individual tortfeasor from liability. Rather, it provides the injured party a choice as to which party to hold liable for the tort." *Id.* at 53, 704 S.E.2d at 310 (citation and quotation marks omitted).

Notably, however, we made clear in *White* that our analysis was unaffected by the economic loss rule due to the absence of a contractual relationship between the parties.

> [O]ur Supreme Court has stated that ordinarily, a breach of contract does not give rise to a tort action by the promisee against the promisor. *This analysis is inapplicable in the present case, however, as Plaintiffs are not promisees of a contract with Defendant.*

Id. at 59 n. 3, 704 S.E.2d at 314 n. 3 (internal citation, quotation marks, and alteration omitted and emphasis added).

Thus, *White* is wholly consistent with the principle that where contractual privity *does* exist between the parties the promisee is limited to the remedies set forth in the terms of its agreement with the promisor. Here, unlike in *White*, Beaufort Builders and White Plains were in contractual privity regarding the construction of the Church.

White Plains nevertheless argues that *White* is, in fact, controlling because its contract was only with Beaufort Builders and that, therefore, no contractual privity existed between itself and *Cherry*. However, this argument ignores the fact that (1) Cherry was the president and co-owner of Beaufort Builders; (2) Cherry's presence at the construction site at all relevant times was due to his company's performance of its contract with White Plains; and (3) all of the acts he undertook while at the site were related to the essential component of Beaufort Builders' contractual obligation to White Plains, which was the construction of the Church. Finally, it bears repeating that the injury White Plains suffered as a result of Cherry's acts was the fact that it did not get the benefit of its bargain with Beaufort Builders — namely, a properly constructed church building that was compliant with all applicable legal requirements so as to render it fit for occupancy and use.

We believe that White Plains' argument, if adopted, would create an impermissible "end run" around the economic loss rule that is inconsistent with the logic underlying that rule. Therefore, we hold that the trial

court did not err in granting Cherry's motion for judgment notwithstanding the verdict as to White Plains' negligence claim against him individually. *See Primerica Life Ins. Co.*, 211 N.C. App. at 267, 712 S.E.2d at 681 ("[T]he trial court properly concluded that [the plaintiff] was entitled to JNOV, and therefore, the trial court's order granting JNOV in favor of [the plaintiff] must be affirmed.").

Conclusion

For the reasons stated above, we affirm.

AFFIRMED.

Judges STEPHENS and STROUD concur.

DANIEL GERALD BLACKMON, Plaintiff
v.
TRI-ARC FOOD SYSTEMS, INC., d/b/a BOJANGLES, Defendant

No. COA15-721

Filed 1 March 2016

Negligence—summary judgment—unforeseeable acts of third parties—contributory negligence

The trial court did not err in a negligence case arising from defendant company's designing and maintaining its parking lot by granting summary judgment in favor of defendant. Defendant has no duty to protect its customers from the unforeseeable acts of third parties. Even assuming that the parking lot design was defective, Ms. Jones's negligence constituted an unforeseeable intervening cause. Further, plaintiff was contributorily negligent by parking along the lane of traffic rather than in a marked parking space. To the extent that the officer's affidavit tended to establish that standing in the road behind the truck was not unreasonable, it only served to underscore the fact that Ms. Jones's criminally negligent driving was not foreseeable.

Appeal by plaintiff from order entered 9 February 2015 by Judge Robert F. Floyd, Jr., in Johnston County Superior Court. Heard in the Court of Appeals 2 December 2015.

Patterson Dilthey, LLP, by Ronald C. Dilthey; and Lucas Denning & Ellerbe, P.A., by Robert V. Lucas and Sarah E. Ellerbe, for plaintiff-appellant.

Goldberg Segalla LLP, by Leigh R. Trigilio and John I. Malone, Jr., for defendant-appellee.

ZACHARY, Judge.

Daniel Blackmon (plaintiff) appeals from an order granting summary judgment in favor of Tri-Arc Food Systems, Inc., d/b/a Bojangles (defendant) on plaintiff's claim for damages based on defendant's negligence in designing and maintaining its parking lot. On appeal plaintiff argues that the trial court erred by entering summary judgment, on the grounds that there were genuine issues of material fact regarding defendant's negligence. We disagree.

I. Background

The essential facts are not disputed and may be summarized as follows: In December 2008, plaintiff was thirty-seven years old and was employed as a third shift employee at Talecris Plasma Resources, located on Highway 70 in Clayton. After completing his shift on 26 December 2008, plaintiff drove to the Bojangles restaurant located at the intersection of Highway 70 and Shotwell Road, arriving just before 8:00 a.m.

Bojangles is a fast food restaurant offering both drive-through and interior food service. Bojangles has a parking lot with marked parking spaces for the use of its customers. Plaintiff, however, chose not to park in a marked space in the parking lot. Instead, plaintiff parked his truck in front of the restaurant along the curb of the main driveway through Bojangles, an area with two-way traffic going east and west. This was an unmarked stretch of roadway that had neither marked parking spaces nor signs prohibiting parking. Plaintiff testified that he parked in this area because he was driving a crew cab truck approximately twenty-two feet long, and his truck would not fit into the marked parking spaces in the Bojangles parking lot, the longest of which was nineteen feet long. In addition, he wanted to be able to observe his truck while he ate. Plaintiff testified that he had chosen to park along the roadway in front of Bojangles on hundreds of prior occasions. The record evidence indicates that defendant's manager and employees were aware that customers sometimes parked along the front driveway. No evidence was introduced to suggest that it was a violation of local ordinance

or state law for plaintiff to park along the road in front of Bojangles. Approximately two years earlier, in 2006, another vehicle parked in front of Bojangles was struck from behind, causing damage to a trailer being towed by the truck. No evidence was presented regarding any other accidents along the road in front of Bojangles.

When plaintiff came out of the restaurant on 26 December 2008, he saw that his rear tail light was damaged, and noticed that another truck parked in defendant's parking lot had corresponding damage to its side mirror. Plaintiff secured the assistance of Officer Cook of the Clayton Police Department, who was eating in Bojangles. Officer Cook directed plaintiff to stand behind plaintiff's truck while Officer Cook took down information from plaintiff's driver's license and truck registration. While plaintiff and Officer Cook stood behind the truck, Ms. Patricia Jones drove her SUV into defendant's parking lot and turned right, heading east along the roadway area where plaintiff had parked his truck. The SUV operated by Ms. Jones struck the back of plaintiff's pickup truck, pinning him between the two vehicles. Ms. Jones testified that when she entered defendant's parking lot and turned right, her attention was diverted by the presence of several police cars in the parking lot to her left and Ms. Jones turned her head to the left. When Ms. Jones returned her attention to the roadway, she was "blinded" because the sun was in her eyes and, as she reached for the overhead visor, her vehicle struck Officer Cook and plaintiff. Ms. Jones did not recall slowing down or applying her brakes before the accident. Ms. Jones was charged with careless and reckless driving, and in February 2009, Ms. Jones pleaded guilty to careless and reckless driving.

As a result of the accident, Plaintiff sustained severe injuries requiring three months of hospitalization, including amputation of his right leg, loss of sight in his left eye, and left leg and pelvis fractures. On 16 February 2011, plaintiff filed suit against defendant. Prior to trial, Judge Thomas H. Lock denied defendant's motion for summary judgment. Plaintiff's claim came on for trial at the 10 June 2013 Civil Session of Johnston County Superior Court. During trial, the trial court excluded plaintiff's proffered expert testimony that the accident would not have occurred if certain safety features, such as speed bumps, had been in place in defendant's parking lot. After the court made this ruling, plaintiff took a voluntary dismissal without prejudice, pursuant to N.C. Gen. Stat. § 1A-1, Rule 41. Plaintiff refiled his claim on 6 September 2013. Plaintiff's complaint alleged that defendant had negligently failed to maintain the parking lot area in a reasonably safe manner. Defendant filed an answer on 6 November 2013, denying the material allegations of

plaintiff's complaint and raising various defenses, including plaintiff's contributory negligence and Ms. Jones's intervening and superseding negligence. Defendant moved for summary judgment on 18 December 2014. **24)** On 9 February 2015, the trial court entered an order granting defendant's motion and dismissing plaintiff's action with prejudice. Plaintiff appealed.

II. Summary Judgment Standard of Review

The standard of review of a trial court's ruling on a motion for summary judgment is well-established:

> Under N.C. Gen. Stat. § 1A-1, Rule 56(a), summary judgment is properly entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." "In a motion for summary judgment, the evidence presented to the trial court must be admissible at trial, N.C.G.S. § 1A-1, Rule 56(e) (2003), and must be viewed in a light most favorable to the non-moving party." "We review a trial court's order granting or denying summary judgment *de novo*. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal."

Patmore v. Town of Chapel Hill, N.C., __ N.C. App. __, __, 757 S.E.2d 302, 304 (quoting *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 467, 597 S.E.2d 674, 692 (2004) (internal citation omitted), and *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (internal quotation omitted)), *disc. review denied*, 367 N.C. 519, 758 S.E.2d 874 (2014).

> The party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact. This burden may be met "by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim."

DeWitt v. Eveready Battery Co., 355 N.C. 672, 681-82, 565 S.E.2d 140, 146 (2002) (quoting *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)) (other citation omitted).

"[O]nce the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial.' " *Pacheco v. Rogers & Breece, Inc.*, 157 N.C. App. 445, 448, 579 S.E.2d 505, 507 (2003) (quoting *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664 (2000), *cert. denied*, 353 N.C. 371, 547 S.E.2d 810 (2001)).

III. Discussion

Plaintiff argues that the trial court erred by granting summary judgment for defendant on plaintiff's claim for negligence. After careful review of the record, we conclude that plaintiff failed to produce evidence showing that he could make at least a *prima facie* case of negligence, and that the trial court did not err by dismissing his claim.

"To state a claim for common law negligence, a plaintiff must allege: (1) a legal duty; (2) a breach thereof; and (3) injury proximately caused by the breach." *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 328, 626 S.E.2d 263, 267 (2006). "[S]ummary judgment is rarely an appropriate remedy in cases of negligence or contributory negligence. However, summary judgment is appropriate in a cause of action for negligence where 'the forecast of evidence fails to show negligence on defendant's part, or establishes plaintiff's contributory negligence as a matter of law.' " *Frankenmuth Ins. v. City of Hickory*, __ N.C. App. __, __, 760 S.E.2d 98, 101 (2014) (quoting *Stansfield v. Mahowsky*, 46 N.C. App. 829, 830, 266 S.E.2d 28, 29 (1980)). " '[A] [p]laintiff is required to offer legal evidence tending to establish beyond mere speculation or conjecture every essential element of negligence, and upon failure to do so, [summary judgment] is proper.' " *Id.* (quoting *Young v. Fun Services-Carolina, Inc.*, 122 N.C. App. 157, 162, 468 S.E.2d 260, 263 (1996)).

> In order to prove a defendant's negligence in a premises liability case, the plaintiff must first show that the defendant either "(1) negligently created the condition causing the injury, or (2) negligently failed to correct the condition after actual or constructive notice of its existence." "The ultimate issue which must be decided in evaluating the merits of a premises liability claim[, however,] is . . . whether [the defendant] breached the duty to exercise reasonable care in the maintenance of [its] premises for the protection of lawful visitors."

Rolan v. Dept. of Agric. & Consumer Servs., __ N.C. App. __, __, 756 S.E.2d 788, 795 (2014) (quoting *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 64, 414 S.E.2d 339, 342-43 (1992), and *Burnham v. S&L Sawmill, Inc.*, __ N.C. App. __, __, 749 S.E.2d 75, 80, *disc. review denied*, 367 N.C. 281, 752 S.E.2d 474 (2013) (internal quotation omitted)).

Plaintiff contends that defendant failed to exercise reasonable care for the safety of its customers, on the grounds that defendant allowed two way traffic in the roadway in front of the restaurant and failed to prevent its customers from parking along the roadway in front of the restaurant. We conclude that:

> 1. Assuming, *arguendo*, that defendant was negligent in the design of its parking lot, the careless and reckless driving of Ms. Jones was not foreseeable, and constituted intervening and superseding negligence; and
>
> 2. Plaintiff's choice to park in front of the restaurant, where two-way traffic was allowed, instead of utilizing a parking space, constitutes contributory negligence as a matter of law.

Ms. Jones admitted in her deposition that when she entered the parking lot she turned her vehicle to the right, while at the same time turning her head to the left to look at law enforcement officers' cars parked in the lot. Thus, as she drove towards plaintiff, she was looking to the side. When Ms. Jones turned her attention back to the road, the sun was in her eyes and she almost immediately struck plaintiff and Officer Cook. Ms. Jones also admitted that after turning right onto the roadway in front of Bojangles, she did not slow down or apply her brakes. In addition, Ms. Jones pleaded guilty to careless and reckless driving. We conclude that Ms. Jones's negligent driving was the immediate proximate cause of plaintiff's injuries. *See, e.g.*, *Thompson v. Bradley*, 142 N.C. App. 636, 544 S.E.2d 258 (2001):

> "Negligence is the failure to exercise proper care in the performance of a legal duty owed by a defendant to a plaintiff under the circumstances." The relevant duty in this case is that of an automobile driver; the driver owes a duty towards his or her passengers to exercise reasonable and ordinary care for their safety. . . . This duty of care was breached if, as alleged in the complaint, [defendant] operated her car in a careless and reckless manner, drove at an unsafe speed, failed to decrease speed to avoid a collision, and generally failed to keep the car under proper control.

Thompson, 142 N.C. App. at 640, 544 S.E.2d at 261 (quoting *Cassell v. Collins*, 344 N.C. 160, 163, 472 S.E.2d 770, 772 (1996)) (other citations omitted).

Defendant has no duty to protect its customers from the unforeseeable acts of third parties.

> We have stated that "[n]o legal duty exists unless the injury to plaintiff was foreseeable and avoidable through due care." The criminal acts of a third party are generally considered "unforeseeable and independent, intervening cause[s] absolving the [defendant] of liability." For this reason, the law does not generally impose a duty to prevent the criminal acts of a third party.

Bridges v. Parrish, 366 N.C. 539, 541, 742 S.E.2d 794, 796-97 (2013) (quoting *Stein*, 360 N.C. at 328-29, 626 S.E.2d at 267-68). In this case, plaintiff has not introduced any evidence that Ms. Jones's careless and reckless driving was foreseeable by defendant. We conclude that, even assuming that the parking lot design was defective, Ms. Jones's negligence constituted an unforeseeable intervening cause.

We further conclude that plaintiff's actions were contributorily negligent. It is undisputed that, although defendant provided clearly marked parking spaces for the use of its customers, plaintiff chose to park along the roadway in front of the restaurant for his own convenience. Plaintiff admitted that he had patronized Bojangles on hundreds of occasions and had parked in the area in front of the restaurant hundreds of times. Assuming, for the purposes of argument, that allowing two way traffic along the roadway in front of Bojangles increased the likelihood of injury to a customer who chose to park there, this is not a hidden danger, but one that was equally apparent to plaintiff. "Reasonable care requires that the landowner not unnecessarily expose a lawful visitor to danger and give warning of hidden hazards of which the landowner has express or implied knowledge." . . . *Thomas v. Weddle*, 167 N.C. App. 283, 290, 605 S.E.2d 244, 248-49 (2004) (internal quotation mark omitted). " 'A landowner is under no duty to protect a visitor against dangers either known or so obvious and apparent that they reasonably may be expected to be discovered . . . [and] need not warn of any apparent hazards or circumstances of which the invitee has equal or superior knowledge.' " *Burnham*, __ N.C. App. at __, 749 S.E.2d at 80 (quoting *Von Viczay v. Thoms*, 140 N.C. App. 737, 739, 538 S.E.2d 629, 631 (2000), *aff'd*, 353 N.C. 445, 545 S.E.2d 210 (2001) (per curiam)). Rather, "[a] reasonable person should be observant to avoid injury from a known and obvious

danger." *Farrelly v. Hamilton Square*, 119 N.C. App. 541, 546, 459 S.E.2d 23, 27 (1995) (citation omitted).

Not only was the traffic pattern in front of Bojangles readily visible to plaintiff, but the alleged risk arose not from a condition or circumstance of the parking lot, such as the presence of ice, but from plaintiff's voluntary choice to park along an unmarked stretch of the driveway instead of in a parking space. "Prudence, rather than convenience, should have motivated the plaintiff's choice. . . . 'If two ways are open to a person to use, one safe and the other dangerous, the choice of the dangerous way, with knowledge of the danger, constitutes contributory negligence . . . which will bar his recovery.' " *Rockett v. City of Asheville*, 6 N.C. App. 529, 533, 170 S.E.2d 619, 621 (1969) (quoting *Dunnevant v. R. R.*, 167 N.C. 232, 233, 83 S.E. 347, 348 (1914)). For example, in *Kelly v. Regency Ctrs. Corp.*, 203 N.C. App. 339, 343, 691 S.E.2d 92, 95-96 (2010), the plaintiff qualified for handicapped parking but chose to park in a non-handicapped parking space and was injured when she stumbled at the curb. We held that:

> Evidence forecast that [the plaintiff] had been a frequent patron of the K&W Cafeteria prior to the accident. It is well settled that a person is contributorily negligent if he or she knows of a dangerous condition and voluntarily goes into a place of danger. In other words, "[w]hen an invitee sees an obstacle not hidden or concealed and proceeds with full knowledge and awareness, there can be no recovery."

(citing *Dunnevant*, and quoting *Wyrick v. K-Mart Apparel Fashions*, 93 N.C. App. 508, 509, 378 S.E.2d 435, 436 (1989)). In this case, plaintiff's own actions in parking on the roadway in front of Bojangles constitutes contributory negligence.

On appeal, plaintiff argues that he cannot be deemed to be contributorily negligent, on the grounds that he stood behind his truck at the direction of a law enforcement officer, and that the law enforcement officer executed an affidavit stating that the officer did not perceive any danger in standing behind the truck. Plaintiff's argument suffers from two flaws. First, plaintiff's contributory negligence did not consist of standing behind his truck with the law enforcement officer, but of parking along the lane of traffic rather than in a marked parking space. Secondly, to the extent that the officer's affidavit tends to establish that standing in the road behind the truck was not unreasonable, this only serves to underscore the fact that Ms. Jones's criminally negligent driving was not foreseeable. The undisputed evidence established that in

twelve years of defendant's operation, only one accident had occurred in the roadway area in front of the restaurant, resulting in property damage to a trailer towed a by truck but no personal injury.

Having reached these conclusions, we do not need to address the issues of whether plaintiff produced evidence that the design of the parking lot was a breach of defendant's duty to exercise reasonable care, or whether plaintiff produced any evidence that the design of the parking lot, rather than plaintiff's voluntary choice to park in an unmarked area along the roadway instead of in a marked parking space, was a proximate cause of his injuries.

For the reasons discussed above, we conclude that the trial court did not err by granting summary judgment in favor of defendant.

AFFIRMED.

Judges CALABRIA and ELMORE concur.

DON'T DO IT EMPIRE, LLC, PLAINTIFF
v.
TENNTEX, A GENERAL PARTNERSHIP, THE ATRIUM CONDOMINIUMS OF RALEIGH OWNERS ASSOCIATION, PETER H. GILLIS, FRANK L. GILLIS, THOMAS N. GILLIS, 112 CONDOS, LLC, CAPITAL CITY CENTER, INC., DANIEL A. LOVENHEIM, ROBERT O'HAN, ELIZABETH F. WYANT AND RICHARD M. GEPHART, DEFENDANTS

No. COA15-939

Filed 1 March 2016

1. Appeal and Error—preservation of issues—Rule 41—failure to argue at trial

Although plaintiff contended that the trial court erred by dismissing its complaint under N.C.G.S. § 1A-1, Rule 41(b)(1) on the grounds that the motion filed by defendants did not specify Rule 41 as a basis for dismissal, plaintiff failed to preserve this argument. Plaintiff availed itself of a full opportunity to respond to defendants' motion on the merits. It was only after plaintiff lost at the trial level that it pursued the argument on appeal that the trial court lacked authority to base its dismissal on Rule 41.

2. Pleadings—motion to amend complaint—relation to prior order—unreasonable delay in prosecution

The trial court did not err by denying plaintiff's motion to amend its complaint and granting a motion by defendants to dismiss plaintiff's complaint with prejudice. Plaintiff's argument that the trial court dismissed its complaint as a sanction for plaintiff's delay in filing an amended complaint was not supported by the provisions of the trial court's order. Further, plaintiff's failure to comply with the order was simply noted as factual evidence of plaintiff's unreasonable delay in prosecuting the case.

3. Parties—necessary parties—failure to properly serve—delay

Although plaintiff contended that the trial court erred by dismissing its separate claims against individual parties based upon plaintiff's failure to add necessary parties, it was not the legal basis of the trial court's order. Plaintiff's failure to properly and promptly serve all necessary parties was evidence of plaintiff's recalcitrance.

4. Civil Procedure—dismissal of complaint—Rule 41—abuse of discretion standard

The trial court did not abuse its discretion by dismissing plaintiff's complaint pursuant to Rule 41 or by denying its motion to amend its complaint. It was within a trial court's discretion to determine the weight and credibility that should be given to all evidence that was presented during the trial.

Appeal by plaintiff from order entered 31 March 2015 by Judge G. Bryan Collins in Wake County Superior Court. Heard in the Court of Appeals 26 January 2016.

Weatherspoon & Voltz LLP, by T. Carlton Younger, III, for plaintiff-appellant.

Stevens Martin Vaughn & Tadych, PLLC, by Michael J. Tadych, for defendants-appellees.

ZACHARY, Judge.

Don't Do It Empire, LLC (plaintiff) appeals from an order denying plaintiff's motion to amend its complaint and granting a motion by Tenntex, Peter H. Gillis, 112 Condos, LLC, Capital City Center, Inc., and Daniel Lovenheim (defendants) to dismiss plaintiff's complaint with prejudice. On appeal plaintiff argues that the trial court erred by considering defendants' arguments for dismissal under N.C. Gen. Stat. § 1A-1, Rule 41(b), on the grounds that defendants' dismissal motion

was not based on Rule 41; that the trial court's dismissal of plaintiff's complaint was based on a misinterpretation of an earlier pretrial order; that the trial court erred by dismissing all of plaintiff's claims, including claims that could have been pursued without adding additional parties to plaintiff's complaint; and that the trial court abused its discretion by denying plaintiff's motion to amend its complaint and by dismissing its complaint. We conclude that the trial court did not err and that its order should be affirmed.

I. Factual and Procedural Background

This appeal arises from a dispute over commercial development in The Atrium condominiums, located at 112 Fayetteville Street, Raleigh. The Atrium is a three story building that consists of six units designated as residential, and two units for commercial use, one designated as an office unit and the other as a restaurant unit. Plaintiff is a North Carolina limited liability company that owns several residential units in The Atrium. Defendant Tenntex, a general partnership whose general partner is defendant Peter Gillis, is the owner of the two commercial units of The Atrium. In 2003, Tenntex incorporated defendant Atrium Condominiums of Raleigh Owners Association (ACROA), a North Carolina non-profit corporation. In 2012, Tenntex leased the restaurant unit of The Atrium to defendant Capital City Center, Inc., ("Capital City") a North Carolina corporation owned by defendant Daniel Lovenheim. Thereafter, Capital City obtained the necessary permits to operate the Capital City Tavern in the restaurant unit of The Atrium, and began renovating the unit for use as a private club.

On 24 April 2014, plaintiff filed suit against defendants Tenntex, ACROA, Peter Gillis, and Capital City. Plaintiff's complaint generally alleged that defendants had failed to follow the requirements of N.C. Gen. Stat. § 47C-1-101 *et. seq.*, known as "The Condominium Act," that Capital City's renovation had not been approved by The Atrium's unit owners, that the construction violated plaintiff's rights as an owner of units in The Atrium, and that operation of Capital City Tavern would be incompatible with the residential use of condominium units. Plaintiff further alleged that defendants' actions had decreased the value of its condominium units and had "resulted in a cloud on the titles for the Residential Unit owners" of The Atrium. Plaintiff sought a declaratory judgment regarding the parties' rights, a temporary restraining order and preliminary injunction to stop further construction, and a permanent injunction against defendants Capital City and Tenntex. Plaintiff also brought a claim for breach of fiduciary duty against defendants Peter Gillis and ACROA.

On 13 May 2014, Judge Michael R. Morgan entered an order denying plaintiff's motion for a temporary restraining order to stop further renovation of the restaurant unit of The Atrium. On 27 May 2014, defendants Tenntex, Peter Gillis, and Capital City filed a motion to dismiss plaintiff's complaint pursuant to N.C. Gen. Stat. § 1A-1 Rule 12(b)(6) for failure to state a claim upon which relief can be granted, and pursuant to N.C. Gen. Stat. § 1A-1 Rule 12(b)(7) for failure to join all necessary parties, on the grounds that plaintiff had not joined all of the owners of condominium units as parties. On 5 June 2014, Judge Donald H. Stephens conducted a hearing on plaintiff's motion for a preliminary injunction, and on defendants' motion to quash subpoenas served by plaintiff and for entry of a protective order. On 13 June 2014, Judge Stephens entered an order granting in part and denying in part defendant's discovery motion, and stating the following regarding plaintiff's motion for a preliminary injunction:

> IT IS THEREEORE ORDERED, ADJUDGED AND DECREED that not all of the necessary parties have been added to the Complaint and therefore the Hearing on Plaintiff's Motion for Protective Order is not ripe for determination and is therefore continued off the calendar. Plaintiff has until June 20, 2014 to amend its complaint to add additional parties. [A] hearing on plaintiff's motion for a preliminary injunction shall not be reset prior to the addition of all necessary parties.

On 9 July 2014, nineteen days after the deadline set by Judge Stephens' order, plaintiff filed its First Amended Complaint. Plaintiff's amended complaint sought relief against the defendants named in its original complaint, and added as additional defendants Frank L. Gillis and Thomas N. Gillis, partners in Tenntex; Robert O'Han, Elizabeth F. Wyant, and Richard M. Gephart, the owners of residential units in The Atrium; 112 Condos, LLC, a limited liability company which purchased the units owned by Mr. O'Han, Ms. Wyant, and Mr. Gephart on 11 July 2014; and Daniel A. Lovenheim, the owner of Capital City and manager of 112 Condos, LLC. The amended complaint sought the same relief as plaintiff's original complaint and added a claim of tortious interference with prospective economic advantage against 112 Condos, LLC, and Peter Gillis; added a claim for private nuisance against Capital City and Mr. Lovenheim; and sought an injunction against Capital City and Mr. Lovenheim to bar these defendants from continuing to create a "private nuisance."

Plaintiff's complaint did not allege any wrongdoing by the owners of the other residential condominium units, and on 14 October 2014

plaintiff entered a voluntary dismissal without prejudice as to its claims against Mr. O'Han, Ms. Wyant, and Mr. Gephart. On the same day, plaintiff filed a motion to amend its First Amended Complaint, in order to reflect the sale of these residential units to 112 Condos, LLC.

On 19 March 2015, defendants served on plaintiff a brief in support of defendants' motion to dismiss plaintiff's complaint and defendants' opposition to plaintiff's motion to amend its complaint. Defendants' brief informed plaintiff that defendants sought to dismiss plaintiff's complaint "pursuant to Rules 5(a1), 12(6) and 41(b) of the North Carolina Rules of Civil Procedure[.]" In its brief, defendants argued that plaintiff's complaint should be dismissed either based on plaintiff's untimely compliance with Judge Stephens' order allowing plaintiff to amend its complaint, or under N.C. Gen. Stat. § 1A-1 Rule 41(b), for failure to prosecute its claims.

The trial court conducted a hearing on plaintiff's motion to amend its complaint and defendants' motion to dismiss plaintiff's complaint on 23 March 2015. During the hearing, plaintiff's counsel stated that he had received defendants' brief several days earlier, and argued to the trial court that plaintiff had diligently prosecuted its claims. On 23 March 2015, after the hearing had concluded, plaintiff provided the trial court with a hand-delivered letter and some thirty pages of accompanying documents in support of plaintiff's argument that its complaint should not be dismissed under N.C. Gen. Stat. § 1A-1, Rule 41(b) for failure to prosecute its claims. The trial court entered an order which denied plaintiff's motion to amend its complaint, and dismissed plaintiff's complaint with prejudice on 31 March 2015. Although the trial court's order does not specifically reference N.C. Gen. Stat. § 1A-1 Rule 41(b), the terms of the order make it clear, and the parties agree, that Rule 41(b) was the basis of the trial court's dismissal of plaintiff's complaint. Plaintiff appealed to this Court.

II. Standard of Review

The question of whether defendants' dismissal motion complied with the provisions of N.C. Gen. Stat. § 1A-1 Rule 7(b)(1) is a matter of law which is reviewed *de novo*. *See N.C. Alliance for Transp. Reform, Inc. v. N.C. Dep't of Transp.*, 183 N.C. App. 466, 469, 645 S.E.2d 105, 107, *disc. review denied*, 361 N.C. 569, 650 S.E.2d 812, (2007) (noting that the issue for review "involves a question of law as to the sufficiency of the motion; therefore, our review . . . is *de novo*"). "[W]e review a trial court's ruling on a motion to amend pleadings for abuse of discretion." *Bartlett Milling Co. v. Walnut Grove Auction & Realty Co.*, 192 N.C.

App. 74, 89, 665 S.E.2d 478, 490, *disc. review denied*, 362 N.C. 679, 669 S.E.2d 741 (2008). The trial court's decision to dismiss a plaintiff's complaint under N.C. Gen. Stat. § 1A-1, Rule 41(b) is also reviewed for abuse of discretion. *Whedon v. Whedon*, 313 N.C. 200, 213, 328 S.E.2d 437, 439 (1985). It is long-established that a trial court abuses its discretion only if its determination is "manifestly unsupported by reason" and is "so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

III. Trial Court's Dismissal of Plaintiff's Complaint under Rule 41

[1] Plaintiff argues first that the trial court erred by dismissing its complaint under N.C. Gen. Stat. § 1A-1, Rule 41(b)(1), on the grounds that the motion filed by defendants seeking dismissal of plaintiff's complaint did not specify Rule 41 as a basis for dismissal. We conclude that, on the facts of this case, plaintiff has not preserved this issue for appellate review.

N.C. Gen. Stat. § 1A-1, Rule 7(b)(1) (2013) provides in relevant part that "[a]n application to the court for an order shall be by motion which . . . shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought." Plaintiff correctly points out that defendants' motion for dismissal was based on N.C. Gen. Stat. § 1A-1, Rules 12(b)(6) and 12(b)(7), for failure to state a claim for relief and failure to join all necessary parties. Defendants' motion for dismissal neither referenced Rule 41(b) nor alleged facts indicating that defendants were seeking dismissal under Rule 41. On 19 March 2015, however, defendants served plaintiff with a brief supporting their motion for dismissal, in which defendants argued that plaintiff's complaint should be dismissed under Rule 41. This was the theory that was argued by the parties at the hearing, and the trial court dismissed plaintiff's complaint based on Rule 41(b), for failure to prosecute its claims. Thus, plaintiff is correct that defendants' motion for dismissal did not correspond to its pre-hearing brief, the arguments presented at the hearing, or the trial court's ultimate ruling. This conclusion does not, however, resolve the question of whether plaintiff is entitled to any relief on the basis of the disparity between defendants' original motion and the theory that defendants pursued at the hearing.

We first note that plaintiff clearly comprehended the basis of defendants' argument for dismissal of its complaint, and availed itself of the opportunity to respond to defendants' contentions. We next address the issue of whether plaintiff properly preserved this argument for appellate review. In this regard, the facts of the instant case are similar

to those of *Carlisle v. Keith*, 169 N.C. App. 674, 614 S.E.2d 542 (2005). In *Carlisle*, the defendant filed a motion for dismissal of the plaintiff's complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) and Rule 12(e). Several months later, the defendant decided to pursue dismissal of some of the plaintiff's claims based on expiration of the statute of limitations. Two days prior to a hearing on the defendant's motion, the defendant provided the plaintiff with a memorandum briefing the issue of the statute of limitations. The plaintiff filed a responsive memorandum opposing the defendant's statute of limitations argument. On appeal, the plaintiff argued that "the trial court erred by considering defendant's statute of limitations defense as to plaintiff's causes of action for fraud, negligent misrepresentation, and civil conspiracy when defendant failed to affirmatively plead such defense in his written motion." *Carlisle*, 169 N.C. App. at 685-86, 614 S.E.2d at 550. We reviewed the requirements of N.C. Gen. Stat. § 1A-1, Rule 7, but held that the plaintiff had waived his objection to the procedural defect in the defendant's motion:

> When a plaintiff responds to a motion to dismiss on the merits, and fails to notify the trial court of an objection to a procedural irregularity, he may be held to have waived that objection. Otherwise, it is the trial court which is deprived of an opportunity to remedy any error that may have existed. This Court has held that a trial court may consider a statute of limitations defense, though not raised in a motion to dismiss, when "the non-movant has not been surprised and has full opportunity to argue and present evidence on the affirmative defense."

Carlisle at 687, 614 S.E.2d at 551 (citing *Thurston v. United States*, 810 F.2d 438, 444 (4th Cir. 1987), and quoting *Johnson v. N.C. Dept. of Transportation*, 107 N.C. App. 63, 66-67, 418 S.E.2d 700, 702 (1992)).

The holding of *Carlisle* is in accord with the general rule governing preservation of an issue for appellate review: N.C.R. App. P. 10(a)(1) (2013) states that:

> In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

We next review the facts of the instant case in the context of both N.C.R. App. P. 10 and the holding of *Carlisle*. On appeal, plaintiff contends that it "had no notice of any ground for dismissal other than those set forth in [defendants'] Motion." However, defendants served plaintiff with a brief arguing for dismissal under Rule 41(b) four days prior to the hearing. During the hearing plaintiff admitted that it had received this brief, yet plaintiff did not move for a continuance or argue that its notice was insufficient to allow preparation. In addition, during the hearing, plaintiff vigorously argued against dismissal of its complaint under N.C. Gen. Stat. § 1A-1, Rule 41(b). Moreover, after the hearing of 23 March 2015 concluded, plaintiff hand-delivered a letter to the trial court later the same day, accompanied by some thirty pages of supporting documents, in order to persuade the trial court not to dismiss its complaint for failure to prosecute. Plaintiff's letter begins as follows:

> Your Honor:
>
> After leaving the courtroom today, I realized I should address the allegation that Plaintiff "has not engaged in any meaningful discovery" and that Plaintiff is solely responsible for the present posture of this action. The movant has a considerable burden to show before a court may dismiss under Rule 41(b). In *Wilder v. Wilder*, 146 N.C. App. 574, 578, 553 S.E.2d 425 (2001), the Court of Appeals held that a trial court must address three factors before dismissing an action for failure to prosecute under Rule 41(b): "(1) whether the plaintiff acted in a manner which deliberately or unreasonably delayed the matter; (2) the amount of prejudice, if any, to the defendant; and (3) the reason, if one exists, that sanctions short of dismissal would not suffice." In order to rule on the extraordinary sanction of [an involuntary] dismissal with prejudice, the Court should be aware of the following facts, which Plaintiff submits results in no unreasonable delay or prejudice to either party:

The remainder of plaintiff's letter elaborated on its contention that its complaint was not subject to dismissal under Rule 41(b). We conclude that plaintiff availed itself of a full opportunity to respond to defendants' motion on the merits.

We further conclude that plaintiff failed to comply with the requirements of N.C.R. App. P. 10 for preservation of issues for appellate review. At one point during the hearing, plaintiff commented on the fact that

defendants were arguing for dismissal on a different ground from that stated in their motion to dismiss:

> PLAINTIFF: Their motion to dismiss, by the way, is under Rule 6 and Rule 7, not under Rule 41. Obviously the Court can have its own discretion regarding that, but their initial motion was under Rules -- I'm sorry. 12(b)(6) and 12(b)(7) and not under 41. Today -- and I received a motion or amendment on Thursday saying that they moved from Rule 12(b)(6) and 12(b)(7) over to Rule 41 for failure to prosecute. That is not their motion that they filed. Their motion is under 12(b)(6), 12(b)(7). That's not what they're arguing. They're arguing 41. One, I don't think they can do that, and then two, I don't think they can establish (inaudible).

These were plaintiff's only statements on this issue. Even if we were to generously construe plaintiff's offhand comment that "I don't think they can do that" to be an objection to the trial court's consideration of dismissal under Rule 41, plaintiff failed to pursue the matter or "to obtain a ruling upon the party's request, objection, or motion," as required by N.C.R. App. P. 10.

> The requirement expressed in Rule 10[(a)] that litigants raise an issue in the trial court before presenting it on appeal goes "to the heart of the common law tradition and [our] adversary system." This Court has repeatedly emphasized that Rule 10[(a)] "prevent[s] unnecessary new trials caused by errors . . . that the [trial] court could have corrected if brought to its attention at the proper time." . . . Rule 10[(a)] thus plays an integral role in preserving the efficacy and integrity of the appellate process. We have stressed that Rule 10[(a)](1) "is not simply a technical rule of procedure" but shelters the trial judge from "an undue if not impossible burden."

Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., 362 N.C. 191, 195, 657 S.E.2d 361, 363 (2008) (quoting *Pfeifer v. Jones & Laughlin Steel Corp.*, 678 F.2d 453, 457 n.1 (3d Cir. 1982), *vacated and remanded on other grounds*, 462 U.S. 523, 103 S. Ct. 2541, 76 L. Ed. 2d 768 (1983), *Wall v. Stout*, 310 N.C. 184, 188-89, 311 S.E.2d 571, 574 (1984), and *State v. Black*, 308 N.C. 736, 740, 303 S.E.2d 804, 806 (1983)) (other citations omitted). In the present case, plaintiff actively participated in the hearing on defendants' motion to dismiss without moving for a continuance or objecting to the trial court's consideration of Rule 41 as a basis for

dismissal. It was only after plaintiff lost at the trial level that it has pursued the argument on appeal that the trial court lacked authority to base its dismissal on Rule 41. We hold that plaintiff failed to preserve this issue for appellate review.

IV. Relationship of Dismissal Order to Earlier Pretrial Order

[2] On 13 June 2014, Judge Stephens entered an order requiring plaintiff to file an amended complaint adding all of the necessary parties no later than 20 June 2014. Plaintiff failed to comply with this order and filed its amended complaint on 9 July 2014, nineteen days after the deadline expressed in the order. In addition, plaintiff's amended complaint failed to add all necessary parties, leading plaintiff to move for leave to file a second amended complaint. On appeal, plaintiff argues that the trial court's order dismissing its complaint "is flawed and should be reversed because it misinterprets the prior June 2014 Order and imposes more stringent sanctions than the prior June 2014 Order required." Plaintiff contends that the trial court erred when it "dismissed the entire case based upon [plaintiff's] failure to comply with the prior June 2014 Order[.]" This argument is without merit.

The premise of plaintiff's argument, that the trial court dismissed its complaint as a sanction for plaintiff's delay in filing an amended complaint, is not supported by the provisions of the trial court's order, which states in relevant part that:

> This Cause being heard before the undersigned [judge] presiding at the March 23, 2015 [session] of Wake County Superior Court upon the duly calendared Motion to Amend by Plaintiff Don't Do It, Empire, LLC, and Motion to Dismiss by Defendants Tenntex, Peter H. Gillis, 112 Condos, LLC, Capital City Center, Inc., and Daniel A. Lovenheim. . . . Defendants The Atrium Condominiums of Raleigh Owners Association, Frank L. Gillis and Thomas N. Gillis have not been served with a summons and complaint in this matter and thus, did not appear. . . . Having considered all the arguments of counsel, reviewed the entire file, Defendants' Brief in Support of Defendants' Motion to Dismiss and in Opposition to Plaintiff's Motion to Amend and its attachments and Mr. Austin's letter to the Court dated March 23, 2015, and its attachments, the Court finds:
>
> (1) That on June 11, 2014, Judge Stephens ordered Plaintiff to amend its complaint to add additional parties by June 20, 2014. Plaintiff filed its amendment on July 9, 2014.

(2) That the Plaintiff has acted in a manner which has deliberately and unreasonably delayed this matter, including but not limited to:

a. failing to join all necessary parties in the first place,

b. failing to serve some of the defendants, and

c. failing to timely comply with discovery;

(3) That Plaintiffs actions have created a high degree of prejudice to the Defendants; and

(4) That the Court has considered sanctions short of dismissal with prejudice but finds that none of them suffice as Plaintiff has:

a. demonstrated its willingness to deliberately delay this action in an apparent effort to drive up costs for defendants;

b. made clear that it has no intention of cooperating with or conducting discovery or moving the lawsuit forward in any meaningful way; and

c. failed or refused to comply with the Court's June 11, 2014, order to timely amend and move the case forward.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that:

(1) The Motion to Amend is DENIED for undue delay and undue prejudice in light of Judge Stephens' June 11, 2014, Order.

(2) The Motion to Dismiss is GRANTED.

(3) The action is dismissed WITH PREJUDICE.

Plaintiff has failed to offer any argument in support of its contention that the trial court's dismissal of its complaint was "based upon [plaintiff's] failure to comply with the prior June 2014 Order." Our review of the trial court's order indicates that plaintiff's complaint was dismissed, as plaintiff argues elsewhere in its appellate brief, pursuant to Rule 41(b), based upon the trial court's determination that plaintiff had failed to prosecute its action. Plaintiff's failure to comply with Judge Stephens' order was simply noted as factual evidence of plaintiff's unreasonable delay in prosecuting the case. Plaintiff is not entitled to relief on the basis of this argument.

V. Relationship of Dismissal Order to Plaintiff's Failure to Add Necessary Parties to its Complaint

[3] In its next argument, plaintiff contends that the trial court erred "by dismissing Plaintiff's separate claims against individual parties based upon [plaintiff's] failure to add necessary parties." Plaintiff argues that the trial court erred by dismissing its complaint in its entirety, on the grounds that some of the claims stated in its complaint might have proceeded without the addition of parties who were necessary for the litigation of other claims. This argument appears to rely on the premise that the trial court's decision to dismiss plaintiff's complaint was based on its failure to add all necessary parties. As discussed above, the basis of the trial court's dismissal of plaintiff's complaint was the trial court's determination that plaintiff had intentionally failed to prosecute its action and had unreasonably delayed the litigation of this matter. Plaintiff's failure to properly and promptly serve all necessary parties was evidence of plaintiff's recalcitrance, but was not the legal basis of the trial court's order. This argument is without merit.

VI. Trial Court's Exercise of Discretion

[4] In its last two arguments, plaintiff asserts that the trial court abused its discretion by dismissing its complaint pursuant to Rule 41, and by denying its motion to amend its complaint. Plaintiff contends generally that the trial court's findings and conclusions are "contrary to the record." In support of its position, plaintiff directs our attention to evidence that might have supported a result more favorable to plaintiff. It is axiomatic that " 'it is within a trial court's discretion to determine the weight and credibility that should be given to all evidence that is presented during the trial.' We will not reweigh the evidence presented to the trial court[.]" *Clark v. Dyer*, __ N.C. App. __, __, 762 S.E.2d 838, 848 (2014) (quoting *Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994)), *cert. denied*, __ N.C. __, 778 S.E.2d 279 (2015). Plaintiff also renews its argument that the trial court "improperly considered" arguments related to plaintiff's failure to prosecute its case and the prejudice that resulted to defendants. We have determined that plaintiff failed to preserve this issue for review. We conclude that plaintiff has failed to establish that the trial court abused its discretion either by denying its motion to amend, or by dismissing its complaint.

For the reasons discussed above, we conclude that the trial court did not err and that its order should be

AFFIRMED.

Judges BRYANT and DILLON concur.

ESTATE OF TABATHA LEE BALDWIN, MATTIE ROLLINS, ADMINISTRATOR, PLAINTIFF
v.
RHA HEALTH SERVICES, INC., RHA/NORTH CAROLINA MR, INC., DBA SOUTHERN AVENUE HOME, DEFENDANT

No. COA15-952

Filed 1 March 2016

1. Medical Malpractice—Rule 9(j) certification—failure to comply—motion to dismiss granted

The trial court did not err by granting defendant's motion to dismiss plaintiff's complaint with prejudice pursuant to N.C.G.S. § 1A-1, Rule 9(j) even though plaintiff contended that defendant was not a health care provider. Plaintiff's complaint sounded in medical malpractice and contained allegations related to the professional services of one or more health care providers as defined by North Carolina law. The factual allegations in plaintiff's complaint showed defendant and its staff were acting at the direction or under the supervision of an on-call nurse and a certified physician's assistant.

2. Medical Malpractice—Rule 9(j) certification—professional services required—beyond ordinary negligence

The trial court did not err by dismissing plaintiff's complaint pursuant to Rule 9(j) and Rule 12(b)(6) even though plaintiff pleaded a claim for ordinary negligence. Each of the factual allegations asserted in plaintiff's complaint described some kind of health care related service provided to decedent under the direction of a health care provider. These medical decisions constituted the rendering of "professional services requiring special skill. Plaintiff's complaint was actually for medical malpractice.

Appeal by plaintiff from order entered 30 April 2015 by Judge W. Russell Duke, Jr., in Cumberland County Superior Court. Heard in the Court of Appeals 10 February 2016.

Gregory B. Thompson for plaintiff-appellant.

Batten Lee PLLC, by Michael C. Allen and Jonathan H. Dunlap, for defendant-appellee.

TYSON, Judge.

Mattie Rollins ("Plaintiff"), administrator of the estate of Tabatha Baldwin, appeals from order granting the motion to dismiss of RHA Health Services, Inc. ("Defendant"), and dismissing Plaintiff's complaint with prejudice. We affirm.

I. Factual Background

In October 2012, Tabatha Baldwin ("Ms. Baldwin") was a resident of Southern Avenue Home, a long-term residential facility for developmentally disabled persons, located in Fayetteville, North Carolina and operated by Defendant. Ms. Baldwin was profoundly mentally retarded and unable to communicate verbally.

At approximately 11:51 a.m. on 7 October 2012, the staff at Southern Avenue Home contacted an on-call nurse to report Ms. Baldwin was vomiting. The on-call nurse instructed the staff to monitor Ms. Baldwin. A follow-up telephone call was made by the nurse at 12:27 p.m. The staff reported Ms. Baldwin had ceased vomiting and there were no other concerns at that time. The on-call nurse requested that the staff continue monitoring Ms. Baldwin.

The staff contacted the on-call nurse again around 1:28 p.m., and reported Ms. Baldwin had "vomited liquid but not as much as earlier." The staff was instructed to start Ms. Baldwin on a clear liquids diet for twenty-four hours. The staff provided the on-call nurse with an update on Ms. Baldwin's status later that afternoon, and reported she was sleeping.

The on-call nurse received another telephone call from the staff at 7:38 p.m., in which the staff reported Ms. Baldwin had a seizure episode "that lasted approximate[ly] one minute." The staff reported Ms. Baldwin had "recovered from the seizure episode with no problems and . . . was 'okay.' "

At 9:18 p.m., the staff informed the on-call nurse that Ms. Baldwin had experienced a "TA (Urination)[,]" she was "a little heavy (almost like dead weight)[,]" and they were using a wheelchair to transport her. The staff also reported Ms. Baldwin "did not eat dinner, but they [were] encouraging her to drink." The on-call nurse recommended that the staff continue monitoring Ms. Baldwin.

Defendant's staff reported the day's events concerning Ms. Baldwin to a certified physician's assistant at 10:35 p.m. The physician's assistant was comfortable with the home staff continuing to monitor Ms. Baldwin throughout the night, but advised the staff to "follow up with the doctor in the morning" if Ms. Baldwin remained stable. The physician's

assistant also advised the staff to have Ms. Baldwin taken to the emergency department if her condition worsened.

Approximately one minute later, at 10:36 p.m., the home staff contacted the on-call nurse to report Ms. Baldwin was "leaning over vomiting and was trying to clear her throat." Defendant's staff also reported a noticeable change in Ms. Baldwin's breathing and asked the on-call nurse to listen over the telephone. The on-call nurse instructed the home staff to "keep [Ms. Baldwin] upright to prevent choking." The on-call nurse also consulted the physician's assistant, and provided an update on Ms. Baldwin's worsening condition. Both health care providers decided to send Ms. Baldwin to the emergency department for further evaluation and treatment.

The on-call nurse contacted Defendant's staff and directed them to send Ms. Baldwin to the emergency department. Emergency medical services ("EMS") transported Ms. Baldwin to Cape Fear Valley Medical Center Emergency Department at approximately 11:19 p.m. The EMS report noted Ms. Baldwin was "unresponsive with chief complaint of 'Code Altered Mental Status' " and "had no gag reflux noted."

Upon her arrival at Cape Fear Valley Medical Center, Ms. Baldwin was intubated for airway protection. The emergency department report noted she was comatose, and her eyes were "fixed and dilated[.]" Ms. Baldwin was admitted into the intensive care unit in the early morning hours of 8 October 2012. On 10 October, Ms. Baldwin's condition was "compatible with brain death." Ms. Baldwin died later that day, with the immediate cause of death reported as pneumonia, seizure disorder, and anoxic encephalopathy.

Plaintiff filed a complaint on 10 October 2014. He alleged claims of ordinary negligence and negligence *per se* against Defendant related to Ms. Baldwin's treatment while a resident at Southern Avenue Home on 7 October 2012. Defendant responded by filing an answer and motion to dismiss on 25 November 2014. Defendant moved to dismiss Plaintiff's claim of negligence *per se* pursuant to North Carolina Rules of Civil Procedure, Rule 12(b)(6), and alleged Plaintiff had "failed to specify any specific and written law the Defendants allegedly violated which would give rise to a negligence *per se* claim."

Defendant also moved to dismiss Plaintiff's entire complaint for failure to comply with the specific pleading requirements of North Carolina Rules of Civil Procedure, Rule 9(j). Defendant alleged: "Plaintiff's Complaint sounds in medical malpractice, yet fails to assert that the

medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a qualifying expert witness prior to filing this lawsuit."

Defendant's motion to dismiss was heard on 6 April 2015. The trial court entered a written order granting Defendant's motion to dismiss on 30 April 2015, wherein it made the following findings of fact and conclusions of law:

> 3. Facts alleged in this Complaint sound in Medical Malpractice and accordingly this Complaint requires compliance with Rule 9(j) of the North Carolina Rules of Civil Procedure. Specifically, this Complaint contains allegations related to the professional services of one or more "health care providers" as defined by North Carolina law.
>
> 4. Plaintiff failed to comply with the substantive and pleading requirements of Rule 9(j) of the North Carolina Rules of Civil Procedure.
>
> 5. Plaintiff's Complaint fails to assert facts sufficient to support a claim of *negligence per se*.

Plaintiff gave timely notice of appeal to this Court.

II. Issues

Plaintiff argues the trial court erred by granting Defendant's motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 9(j). He asserts his complaint was improperly treated as a medical malpractice action. Plaintiff contends: (1) Defendant does not fall within the statutory definition of "health care provider;" and (2) his claim of ordinary negligence does not require an expert witness certification.

III. Standard of Review

"A plaintiff's compliance with [N.C. Gen. Stat. § 1A-1,] Rule 9(j) . . . presents a question of law to be decided by a court, not a jury. A question of law is reviewable by this Court *de novo*." *Carlton v. Melvin*, 205 N.C. App. 690, 692, 697 S.E.2d 360, 362 (citation and quotation marks omitted), *disc. review denied*, 364 N.C. 605, 703 S.E.2d 441 (2010). "When ruling on a motion to dismiss pursuant to Rule 9(j), a court must consider the facts relevant to Rule 9(j) and apply the law to them." *Estate of Wooden ex rel. Jones v. Hillcrest Convalescent Ctr., Inc.*, 222 N.C. App. 396, 403, 731 S.E.2d 500, 506 (2012) (citation and internal quotation marks omitted).

> On a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the standard of review is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. The complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief.

Holleman v. Aiken, 193 N.C. App. 484, 491, 668 S.E.2d 579, 584-85 (2008) (citation and quotation marks omitted).

"Dismissal is warranted (1) when the face of the complaint reveals that no law supports plaintiffs' claim; (2) when the face of the complaint reveals that some fact essential to plaintiffs' claim is missing; or (3) when some fact disclosed in the complaint defeats plaintiffs' claim." *Walker v. Sloan*, 137 N.C. App. 387, 392, 529 S.E.2d 236, 241 (2000) (citation and internal quotation marks omitted).

"[T]he trial court regards all factual allegations of the complaint as true. Legal conclusions, however, are not entitled to a presumption of truth." *Id.* (citations omitted). This Court "conducts a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, 231 N.C. App. 70, 74, 752 S.E.2d 661, 663-64 (2013) (citation omitted).

IV. Analysis

A. Compliance with Rule 9(j)

[1] Plaintiff contends the trial court erroneously dismissed his complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 9(j). Plaintiff argues Rule 9(j) certification was not required because Defendant is not a "health care provider," as defined by N.C. Gen. Stat. § 90-21.11.

Rule 9(j) of the North Carolina Rules of Civil Procedure sets forth the procedures with which a plaintiff must comply when filing a medical malpractice action. Rule 9(j) provides:

> Any complaint alleging medical malpractice by a health care provider pursuant to [N.C. Gen. Stat. §] 90-21.11(2)a. in failing to comply with the applicable standard of care under [N.C. Gen. Stat. §] 90-21.12 *shall be dismissed unless*:

> (1) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care;
>
> (2) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; or
>
> (3) The pleading alleges facts establishing negligence under the existing common-law doctrine of res ipsa loquitur.

N.C. Gen. Stat. § 1A-1, Rule 9(j) (2015) (emphasis supplied).

"Medical malpractice action" is statutorily defined, in pertinent part, as "[a] civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider." N.C. Gen. Stat. § 90-21.11(2)(a) (2015).

N.C. Gen. Stat. § 90-21.11(1) defines "health care provider" as:

> a. A person who pursuant to the provisions of Chapter 90 of the General Statutes is licensed, or is otherwise registered or certified to engage in the practice of or otherwise performs duties associated with any of the following: medicine, surgery, dentistry, pharmacy, optometry, midwifery, osteopathy, podiatry, chiropractic, radiology, nursing, physiotherapy, pathology, anesthesiology, anesthesia, laboratory analysis, rendering assistance to a physician, dental hygiene, psychiatry, or psychology.
>
> b. A hospital, a nursing home licensed under Chapter 131E of the General Statues, or an adult care home licensed under Chapter 131D of the General Statues.

> c. Any other person who is legally responsible for the negligence of a person described by sub-subdivision a. of this subdivision, a hospital, a nursing home licensed under Chapter 131E of the General Statutes, or an adult care home licensed under Chapter 131D of the General Statutes.
>
> d. *Any other person acting at the direction or under the supervision of* a person described by sub-subdivision a. of this subdivision, a hospital, a nursing home licensed under Chapter 131E of the General Statutes, or an adult care home licensed under Chapter 131D of the General Statutes.

N.C. Gen. Stat. § 90-21.11(1)(a)-(d) (2015) (emphasis supplied).

Plaintiff argues Defendant does not fall under one of the enumerated definitions of "health care provider" set forth in N.C. Gen. Stat. § 90-21.11(1), and he was not required to obtain Rule 9(j) certification because his complaint is not a medical malpractice action. We disagree.

"In determining whether or not Rule 9(j) certification is required, the North Carolina Supreme Court has held that pleadings have a binding effect as to the underlying theory of plaintiff's negligence claim." *Sturgill v. Ashe Mem'l Hosp., Inc.*, 186 N.C. App. 624, 628, 652 S.E.2d 302, 305 (2007) (citations and internal quotation marks omitted), *disc. review denied*, 362 N.C. 180, 658 S.E.2d 662 (2008).

The crux of Plaintiff's argument relies on the statute's specific inclusion of facilities "licensed under Chapter 131[] of the General Statutes" in its definition of "health care provider." N.C. Gen. Stat. § 90-21.11(1)(b), (c). Plaintiff contends Defendant is not a statutorily defined "health care provider," because Defendant is licensed pursuant to Chapter 122C of our General Statutes. Plaintiff's argument misconstrues the role Defendant's staff played in the treatment of Ms. Baldwin, in light of the definitions set forth in N.C. Gen. Stat. § 90-21.11(1).

Here, the factual allegations in Plaintiff's complaint outline how Defendant's staff coordinated with both the on-call nurse and a physician's assistant to address Ms. Baldwin's ongoing health problems throughout the day and evening of 7 October 2012. Plaintiff's complaint clearly alleges Defendant's staff was, at all times relevant to this action, seeking advice and treatment options, and taking directives from the on-call nurse and a certified physician's assistant with regard to Ms. Baldwin's care, such as: (1) dietary changes; (2) positioning Ms. Baldwin

to avoid asphyxiation; (3) general patient monitoring; and (4) when to increase Ms. Baldwin's level of care to a hospital setting.

The factual allegations in Plaintiff's complaint unmistakably show Defendant and its staff were "acting at the direction or under the supervision" of persons "described by sub-subdivision a. of this subdivision" — namely, the on-call nurse and a certified physician's assistant — and are included within the statutory definition of "health care providers" under N.C. Gen. Stat. § 90-21.11(1)(d).

The trial court correctly determined Plaintiff's complaint "sound[s] in Medical Malpractice and . . . requires compliance with Rule 9(j) of the North Carolina Rules of Civil Procedure" because Plaintiff's "[c]omplaint contains allegations related to the professional services of one or more 'health care providers' as defined by North Carolina law." The trial court properly dismissed Plaintiff's complaint for "fail[ure] to comply with the substantive and pleading requirements of Rule 9(j)[.]" This argument is overruled.

B. Ordinary Negligence

[2] Plaintiff argues the trial court erred by dismissing his complaint pursuant to Rule 9(j) and Rule 12(b)(6) based upon a failure to state a claim for ordinary negligence. Plaintiff contends his complaint alleges a claim for ordinary negligence, rather than medical malpractice, and did not require an expert witness certification pursuant to Rule 9(j).

"[N]egligence actions against health care providers may be based upon breaches of the ordinary duty of reasonable care where the alleged breach does not involve rendering or failing to render professional services requiring special skills." *Duke Univ. v. St. Paul Fire and Marine Ins. Co.*, 96 N.C. App. 635, 640-41, 386 S.E.2d 762, 766, *disc. review denied*, 326 N.C. 595, 393 S.E.2d 876 (1990). This Court has defined "professional services" to mean "an act or service arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual." *Sturgill*, 186 N.C. App. at 628, 652 S.E.2d at 305 (citations and internal quotation marks omitted) (holding the decision to apply restraints is a "professional service" because it "is a medical decision requiring clinical judgment and intellectual skill").

Plaintiff's complaint alleges Defendant "breached the duty to provide timely and prompt access to medical care, and to properly train its non-medical staff." This argument is unsupported by, and at times

in direct contradiction with, the factual allegations Plaintiff asserts in his complaint. Furthermore, Plaintiff's artful attempt to frame his claims against Defendant as "untimely and delayed access to medical care" would not, *ipso facto*, remove this action from within the purview of medical malpractice. *See Katy v. Capriola*, 226 N.C. App. 470, 473, 742 S.E.2d 247, 250 (2013) (addressing claim that failure to timely diagnose and treat congestive heart failure resulted in delayed access to the appropriate medical care as medical malpractice action); *Tripp v. Pate*, 49 N.C. App. 329, 337, 271 S.E.2d 407, 412 (1980) (addressing claim that failure to timely diagnose and treat post-surgical infection resulted in delayed access to appropriate medical care as medical malpractice action); *Weatherman v. White*, 10 N.C. App. 480, 481, 179 S.E.2d 134, 135 (1971) (addressing claim that failure to timely diagnose and treat cancer resulted in delayed access to medical care as medical malpractice action).

Plaintiff's complaint details how Defendant's staff regularly consulted with, and took instruction from, the on-call nurse and physician's assistant numerous times over an eleven-hour period. The home staff received several directives from the on-call nurse, and undertook medical interventions in the treatment of Ms. Baldwin. Each of the factual allegations asserted in Plaintiff's complaint describes some kind of health care-related service, which was provided to Ms. Baldwin under the direction of a "health care provider." N.C. Gen. Stat. § 90-21.11(1).

Additionally, Plaintiff's complaint fails to allege what, if any, delay occurred in Ms. Baldwin's medical treatment. *See Sturgill*, 186 N.C. App. at 629, 652 S.E.2d at 306 ("Plaintiff does not allege that defendant had any duty to check on decedent sooner than within an hour and a half, and makes no allegation as to how failing to check on plaintiff during that hour and a half caused plaintiff's injuries.").

Plaintiff's argument that Defendant breached its duty to provide Ms. Baldwin with timely and prompt access to medical care is utterly unsupported by the factual allegations in his complaint. Plaintiff's complaint also fails to assert any factual allegations whatsoever, which, taken as true, would tend to support his position on appeal that Defendant did not properly train its staff.

As discussed *supra*, Plaintiff's allegations show Defendant's staff was providing health care services under the direction and supervision of the on-call nurse and a certified physician's assistant, both of whom are statutorily defined as "health care providers." These medical decisions constitute the rendering of "professional services requiring special

skill." *Duke Univ.*, 96 N.C. App. at 640-41, 386 S.E.2d at 766. The trial court properly determined Plaintiff's complaint "sounds in medical malpractice" and required Rule 9(j) certification. The trial court correctly dismissed Plaintiff's complaint for failure to state a claim for ordinary negligence, and failure to comply with Rule 9(j). Plaintiff's argument is overruled.

V. Conclusion

Defendant falls within the statutory definition of a "health care provider," and Plaintiff failed to state a viable claim for ordinary negligence. Plaintiff's complaint essentially alleged a medical malpractice action, and Rule 9(j) certification was required. Plaintiff failed to certify his complaint pursuant to Rule 9(j). The trial court's order dismissing Plaintiff's complaint for failure to state a claim and failure to comply with Rule 9(j) is affirmed.

AFFIRMED.

Judges CALABRIA and DAVIS concur.

POLYFIELD HARRIS, WILLIAM HARRIS, TONYA BARKLEY, SAMANTHA DAVIS, AND PATRICIA PERKINS, PLAINTIFFS

v.

MYRA H. GILCHRIST, VALERIE HARRIS, THE ESTATE OF THOMAS HARRIS, ROOSEVELT HARRIS, DOROTHY MORANT, AND HELEN HOWARD, DEFENDANTS

No. COA15-437

Filed 1 March 2016

1. Partition—methodology for value—betterments—improvements

The trial court did not err by the methodology it used to ascertain the value of defendants' betterments of the pertinent property. However, the case was remanded so the trial court could make findings as to how much, if any, of the proceeds from the sale of the property were attributable to these improvements.

2. Adverse Possession—color of title—entitlement to rents

The trial court did not err in part by concluding that plaintiffs were not entitled to rents for the period that Thomas Harris and his daughters occupied the pertinent property under color of title.

There was no evidence tending to show that Thomas Harris prevented his siblings' access to the pertinent property at any point. However, on remand defendants' betterment value could be offset by the fair market value of the rent for the period between the delivery of the 1993 deed and the death of Mr. Harris, Sr., in 1997.

3. Sales—real property—apportionment of proceeds—contribution—expenses—taxes—property insurance

The trial court did not err by apportioning the proceeds to which plaintiffs were entitled from the sale of the pertinent real property. Thomas Harris' daughters were entitled to contribution for expenses including taxes and property insurance which accrued after Mr. Harris, Sr.'s death in 1997. Neither Thomas Harris nor any of Mr. Harris, Sr.'s heirs had any ownership interest in the pertinent property prior to Mr. Harris, Sr.'s death.

Appeal by Plaintiffs from order entered 15 July 2014 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 7 October 2015.

Rhodes Law Firm, PLLC, by M. Annette Rhodes, for the Plaintiffs-Appellees.

Nathaniel Currie for the Defendants-Appellants.

DILLON, Judge.

Polyfield Harris, William Harris, Tonya Barkley, Samantha Davis, and Patrick Perkins ("Plaintiffs") appeal from the trial court's order (1) denying their claims for rents and profits and for attorneys' fees and (2) apportioning the proceeds to which they are entitled from the sale of certain real property.

I. Background

This is a dispute among tenants in common – all lineal descendants and heirs of the late James Harris, Sr. – as to how the proceeds from *the sale by partition* of certain real estate (the "Property") they inherited from Mr. Harris, Sr., should be divided.

The record evidence tends to show the following:

James Harris, Sr., had seven children, including a son, Thomas Harris. Mr. Harris, Sr., owned and lived on the Property.

In 1993, four events occurred which are relevant to this action: (1) Mr. Harris, Sr., suffered a stroke and moved off of the Property. (2) He executed a document naming Defendant Myra Gilchrist (his granddaughter and Thomas Harris' daughter) as his power of attorney. (3) Exercising her newfound authority, Defendant Gilchrist executed a deed (the "1993 deed") conveying her grandfather's Property to her father, unbeknownst to her grandfather's other six children. (4) Thomas Harris moved onto the Property, where he lived, undisturbed by his siblings, until his death in 2008.

In 1997, Mr. Harris, Sr., died. There is evidence that Thomas Harris' siblings were unaware of the 1993 deed and believed that they each inherited an interest (along with their brother Thomas) in the Property and that the siblings allowed their brother Thomas to continue living in the house.

In 2008, Thomas Harris died leaving two daughters, Defendant Gilchrist and her sister, Defendant Valarie Harris. His two daughters took possession of the Property, claiming 100% ownership as Thomas Harris' heirs through the 1993 deed. The other heirs of Mr. Harris, Sr., did not become aware of the 1993 deed until after Thomas Harris' death.

In 2010, three of Thomas Harris' siblings filed this action against Thomas Harris' estate and his two daughters claiming an ownership interest in the Property, contending that the 1993 deed was void. Further, Plaintiffs made a claim against Thomas Harris' estate and his two daughters for rents and profits for the time Thomas Harris and his daughters were in sole possession of the Property.

In 2011, after a hearing on the matter, the trial court granted partial summary judgment for Plaintiffs, declaring the 1993 deed *void ab initio*. This partial summary judgment order effectively declared that title to the Property was still held by Mr. Harris, Sr., at the time of his death and, upon his death, title passed to his seven children, as tenants in common. This order has not been appealed.

Thereafter, Plaintiffs, as tenants in common, filed a petition with the clerk for a partition of the Property by sale.[1] The clerk appointed a commissioner, who sold the Property for $53,000.00. The clerk entered an order dividing the proceeds from the sale among the tenants in common. This order was appealed to the superior court.

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1. The heirs of Mr. Harris, Sr., who had not joined in the filing of the action were subsequently joined as Defendants, being necessary parties to the partition proceeding.

The matter came on for a bench trial in superior court. The court entered its judgment dividing the proceeds of the sale. Out of these proceeds, the court awarded Thomas Harris' daughters the value of the improvements placed on the Property by Thomas Harris during his lifetime (or betterments) and also a reimbursement for certain Property expenses paid by Thomas Harris during his lifetime. The court expressly denied a claim by Plaintiffs that *they* receive an award for the years of exclusive possession of the Property by Thomas Harris and his daughters. Plaintiffs entered written notice of appeal.[2]

II. Analysis

In this action, the 1993 deed, which purportedly conveyed Mr. Harris, Sr.'s, 100% ownership in the Property to Thomas Harris, has been declared void. Accordingly, Thomas Harris' daughters were tenants in common with Mr. Harris, Sr.'s, other heirs. A partition sale was ordered, and the Property was sold. This dispute concerns the trial court's division of the sale proceeds. Specifically, we consider whether the trial court erred in making an award to Thomas Harris' daughters for the betterments and Property expenses and in denying Plaintiffs an award for the fair rental value of the Property for the period that Thomas Harris and his daughters possessed the Property.

A. Value of Improvements

[1] Our Supreme Court has explained that our Betterment Statutes, now codified in N.C. Gen. Stat. § 1-340, *et seq.*, were enacted "to introduce into the law of North Carolina an equity in favor of one who has purchased lands, and in the belief that he has acquired a good title thereto, has made lasting improvements, popularly called *betterments* . . . [and] that upon eviction by the true owner, such an occupier [is] entitled to an allowance for his improvements." *Pope v. Whitehead*, 68 N.C. 191, 198-199 (1873) (emphasis added). That is, prior to the passage of the Betterment Statutes, North Carolina did not recognize the right of an occupier – who is ejected from land that he believed, in good faith, that he owned – to receive from the true owner an accounting for the increase in the land's value caused by his improvements. *Id.* at 199.

Our Supreme Court further explained, however, that *even before the passage of the Betterment Statutes*, North Carolina had always

2. The trial court also denied Plaintiffs' claim for attorneys' fees. However, on appeal, Plaintiffs make no argument concerning this portion of the order; and, therefore, this issue is abandoned. *See* N.C. R. App. P. 28(b)(2).

recognized the equitable remedy of a tenant in common (as opposed to an occupier with no ownership interest) to receive an allowance for any improvements (s)he makes to property at the time the property was partitioned. *Id.* at 199-200 (stating that "in all cases of partition, a Court of equity does not act merely in a ministerial character, and in obedience to the call of the . . . [tenants in common]; but it founds itself upon its general jurisdiction as a Court of equity, and administers its *ex aequo et bono* [Latin for "according to the right and good"] according to its own notions of general justice and equity between the parties"). Essentially, the Betterments Statutes provided non-owners a remedy that equity already was providing to tenants in common.

Here, we consider the claim by Thomas Harris' daughters for an allowance for the improvements made by their father to the Property, recognizing that Thomas Harris had no ownership in the Property until his father's death in 1997, at which time he became a tenant in common with his siblings. *See, e.g.*, *Daniel v. Dixon*, 163 N.C. 137, 138-39, 79 S.E. 425, 425-26 (1913) (recognizing that a tenant in common is entitled to a credit for the other tenant's pro rata share of the value of the improvements he makes to the property during the time he had bona fide reason to believe that he was the *sole* owner under a deed which was later declared to be void); *Harris v. Ashley*, 38 N.C. App. 494, 497-98, 248 S.E.2d 393, 395-96 (1978) (holding that a tenant in common who improves property reasonably believing that he is the sole owner "is entitled to recover the amount by which he has enhanced the value of the property"). We note that the other co-tenants have made no argument concerning Defendants' betterments claim, *per se*. Rather, they argue that the trial court erred in determining *the amount* of the allowance for the improvements.

Our Supreme Court has held that *the amount* of the credit should be based *not* on "the actual cost in making the [improvements], *but* [on] the enhanced value they g[ive] the premises." *Carolina Cent. R. Co. v. McCaskill*, 98 N.C. 526, 537, 4 S.E. 468, 474 (1887) (emphasis added). Our Court has likewise so held. *Harris*, 38 N.C. App. at 498, 248 S.E.2d at 396 (holding that the actual expenditures are the "wrong measure of damages" and that the tenant in common who improves the property "is entitled to recover the amount by which he has enhanced the value of the property").

In its order, the trial court made an award to Thomas Harris' daughters for the improvements based on a finding that "[t]he value of the permanent improvements made by Thomas Harris is at least $31,599.00 based on the increase in the assessed [tax] value of the property from

$26,090.00 to $57,689.00 during the period that Thomas Harris occupied the property." There is no other finding in the order regarding *the value* of the Property or the improvements made by Thomas Harris.

We hold that the trial court did not err in the *methodology* used to ascertain the amount of the allowance. Indeed, the court appears to have based the amount on the change in the Property's value caused by Thomas Harris' improvements.[3] However, we agree with Plaintiffs that *the evidence relied on* by the trial court was not competent to show the amount by which the improvements (betterments) had increased the value of the Property. Rather, the evidence cited by the trial court merely shows that the Property had a tax value of $26,060.00 in 1993 and a tax value of $57,689.00 in 2008. Assuming that the tax value is competent evidence as to the property's value as of a particular date, the fact that the Property was worth $26,060.00 in 1993 and $57,689.00 in 2008 does not tend to show at all how much the improvements made by Thomas Harris during that time added to the value of the Property. It is probable that much (if not all) of this increase in value was passive in nature, resulting from the normal inflation in real estate values generally over the fifteen-year period. Further, it may be that the 2008 value itself is too remote in time, as a matter of law, to establish the value of the Property as of the date it was eventually sold. On remand, the trial court shall make findings as to how much (if any) of the proceeds from the sale were attributable to the improvements made by Thomas Harris.

B. Rents

[2] Plaintiffs argue that the trial court erred in concluding that they were *not* entitled to rents for the period that Thomas Harris and his daughters occupied the Property under color of title. We agree in part.

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3. The fact that the improvements may have been made before the co-tenants ever acquired title to the Property (that is, when Mr. Harris, Sr., was still alive and owned the Property) does not change the amount of the allowance assessed against the other co-tenants. The nature of the claim is not personal, i.e., against the person who happened to be the true owner at the time the improvements were made. *Board of Comm'rs of Roxboro v. Bumpass*, 237 N.C. 143, 146-47, 74 S.E.2d 436, 439 (1953). Rather, it is a right which only accrues when (1) in the case of betterments, the true owner asserts his claim to title, see id., or (2) in the case of tenants in common, the time of partition, *see Pope v. Whitehead*, 68 N.C. 191, 199-200 (1873). It is the co-tenants/current owners (and not some prior true owner) who would be unjustly enriched by the improvements without the allowance. *See, e.g.*, *Harriet v. Harriet*, 181 N.C. 75, 78, 106 S.E. 221, 222 (1921) (holding that a remainderman successfully claiming fee simple title to property is liable to the occupier for improvements made during the life tenancy preceding the remainderman's interest).

Our Betterments Statutes generally allow for one against whom a claim for betterments is made to recover *the fair market rental value* of the property for the time the one claiming the betterments occupied the property. *See*, *e.g.*, N.C. Gen. Stat. § 1-341. Rent, though, which accrues more than three years before the filing, may only be used *to offset* the betterments allowance (and not to establish a claim for affirmative relief). *Id.* In any case, our Supreme Court has held that rents are not recoverable as an offset to betterments where one would not be entitled to rents in the first instance. *Harriet v. Harriet*, 181 N.C. 75, 78, 106 S.E. 221, 222 (1921).

The equities in a situation involving tenants in common is similar: Though one tenant in common is "not liable for the use and occupation of the lands, but only for the rents and profits received [from third parties]," *see Whitehurst v. Hinton*, 209 N.C. 392, 403, 184 S.E. 66, 73 (1936), co-tenants may otherwise collect rents from an occupying co-tenant when there has been *an actual ouster* by the occupying co-tenant of the non-occupying co-tenants, *see Roberts v. Roberts*, 55 N.C. 129, 134 (1855).

In the present case, both the principles involving co-tenants and the law under our Betterment Statutes apply. That is, Thomas Harris did not become a co-tenant until after his father's death in 1997. Accordingly, during this time (1993-1997) the co-tenants (as heirs of Mr. Harris, Sr.) *may be* entitled to their pro rata share of the fair rental value of the Property (without Thomas Harris' improvements) to the extent they do not exceed the allowance awarded for the improvements. In other words, the equity afforded to Thomas Harris' daughters for the improvements made to the Property may be subject to an offset in the amount of the benefit Thomas Harris derived from possessing the Property between 1993 and 1997 when he had no right of possession, but rather possessed under color of title.

However, we hold that the co-tenants are *not* entitled to rents for any occupancy by Thomas Harris or his daughters after Mr. Harris, Sr.'s, death in 1997. During that time, Thomas Harris was a co-tenant; and the evidence does not show that there was an actual ouster by him of his siblings. Specifically, an *actual ouster* is "[a] cotenant's clear positive denial of another cotenant's rights in the common property[.]" *Beck v. Beck*, 125 N.C. App. 402, 404, 481 S.E.2d 317, 319 (1997). The mere fact that the 1993 deed was filed, creating color of title in favor of Thomas Harris, is not enough to constitute *the actual ouster* of the other co-tenants. Rather, "[t]he color must be strengthened by possession, *which must be open*, *notorious*, *and adverse*[.]" *Cothran v. Akers Motor Lines*, *Inc.*,

257 N.C. 782, 784, 127 S.E.2d 578, 580 (1962) (emphasis added). In the present case, there was no evidence tending to show that Thomas Harris prevented his siblings' access to the Property at any point. Accordingly, we conclude that the portion of the trial court's order denying Plaintiffs' claim for rents and profits during the time of the co-tenancy (i.e. after Mr. Harris, Sr.'s, death in 1997) is supported by its findings and based on evidence in the record.

C. Contributions

[3] Plaintiffs next argue that the trial court erred in concluding that Thomas Harris' daughters are entitled to contribution for certain property tax and homeowner's insurance expenses paid by Thomas Harris and his daughters between 1993 and 2010. We agree, in part. Specifically, we hold that Thomas Harris' daughters are entitled to contribution for said expenses which accrued *after* Mr. Harris, Sr.'s, death in 1997. *See, e.g.*, *Holt v. Couch*, 125 N.C. 456, 460, 34 S.E. 703, 704 (1899) (holding that a co-tenant who pays taxes and other expenses necessary for the preservation of the property "will have a lien upon the common property to secure such reimbursement"). However, they are not entitled to contribution from *the other co-tenants* for said expenses accruing before Mr. Harris, Sr.'s, death because none of the co-tenants are liable for Property expenses which accrued prior to the time that they became owners.

The 1993 deed being void, Thomas Harris became a co-tenant with his siblings upon their father's death in 1997. Under N.C. Gen. Stat. § 105-363(b), "a cotenant who pays a greater share of the taxes, interest[,] and costs [may] enforce a lien in his favor upon the shares of the other joint owners in . . . any [] appropriate judicial proceeding." *Knotts v. Hall*, 85 N.C. App. 463, 465, 355 S.E.2d 237, 239 (internal marks omitted), *aff'd per curiam*, 321 N.C. 119, 361 S.E.2d 591 (1987). The *Knotts* Court stated that an exception to this rule *may* exist where the co-tenant paying the taxes and costs is in "exclusive possession" of the property. *Id.* at 466, 355 S.E.2d at 239. The Court cited *Webster's Real Estate Law in North Carolina*, Sec. 117 in support of the view that "a cotenant in *exclusive* possession is not entitled to reimbursement for taxes paid during the time he held the property exclusively." *Id.* (emphasis in original). The Court, however, reasoned that a co-tenant's "sole possession" did not necessarily equate to "exclusive possession." *Id.* at 467, 355 S.E.2d 240. The Court went on to hold that there was "no basis for a finding of exclusive possession" where the occupying co-tenant made no attempt to withhold the property from the other co-tenants and where the other co-tenants made no demand to possess the property. *Id.*

In the present case, as in *Knotts*, neither Thomas Harris nor his daughters withheld the Property from the other co-tenants, and the other co-tenants never made any demand to possess the Property after Mr. Harris, Sr.'s, death. Accordingly, as in *Knotts*, the trial court did not err in awarding Thomas Harris' daughters an allowance for the taxes and insurance paid by them and their father *during the time they were tenants in common*, as the record tends to show "sole possession," not "exclusive possession." *See id.* However, Thomas Harris' daughters are not entitled to contribution from the co-tenants for the expenses which accrued prior to Mr. Harris, Sr.'s, death. Neither Thomas Harris nor any of Mr. Harris, Sr.'s, heirs had any ownership interest in the Property prior to Mr. Harris, Sr.'s, death in 1997.

D. Other Arguments

We note that Plaintiffs further argue that the trial court erred in failing to assess costs against Thomas Harris' daughters based on Plaintiffs' contention that it should have been clear to the daughters that their claim for betterments was easily offset by Plaintiffs' claim for rents. However, since we have held that the trial court did not err in denying Plaintiffs' claim for rents, this argument is overruled.[4]

Also, Plaintiffs contend that the case should be remanded for correction of certain mathematical errors in the trial court's order. The calculation at issue includes the trial court's finding as to the value of the improvements made by Thomas Harris. However, as we have reversed this finding of value and remanded the matter for the trial court to make new findings, Plaintiffs' argument regarding the mathematical error is moot.

III. Conclusion

The parties were tenants in common in the Property. The Property was partitioned by sale.

The trial court did not err in concluding that Thomas Harris' daughters are entitled to an allowance out of the sales proceeds for the value of the improvements made by their father. However, the trial court erred

4. Plaintiffs additionally contend that the trial court erred in failing to assess costs against Defendants and in denying their motion for relief from judgment under N.C. Gen. Stat. § 6-21(7) and Rule 11 of the North Carolina Rules of Civil Procedure. However, nothing of record in this appeal gives rise to an inference that the trial court abused its discretion in refusing to tax the costs of this action against Defendants, the prevailing parties. Indeed, Defendants' success on the merits belies the assertion that maintenance of their claims was improper.

in valuing the improvements. On remand, the trial court shall make new findings regarding this value. This value, however, may be offset by the fair market value of the rent of the Property (not including any portion of said fair market rental value attributable to the improvements by Thomas Harris) for the period between the delivery of the 1993 deed and the death of Mr. Harris, Sr., in 1997. The trial court, on remand, shall make findings concerning Plaintiffs' claims for this fair market rental value.

Further, we hold that the trial court did not err in concluding that Thomas Harris' daughters are entitled to an allowance for the taxes and property insurance paid by them and their father which accrued *after* the death of Mr. Harris, Sr.

Any amount remaining from the net proceeds of the partition sale shall be divided among the parties based on their pro rata ownership of the Property.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Judges GEER and HUNTER, JR., concur.

IN THE MATTER OF ESTATE OF LA-REKO A. WILLIAMS

No. COA 15-619

Filed 1 March 2016

1. Paternity—legitimization—strict compliance with statute

The trial court did not err by holding that a minor had not been legitimated based on substantial compliance with N.C.G.S. § 29-19(b)(2). Failure to meet the exact requirements of the statute leaves the child in an illegitimate position for intestate succession purposes.

2. Constitutional Law—legitimization statute—Equal Protection—no violation

N.C.G.S. § 29-19(b)(2) is not unconstitutional under the Equal Protection Clause because it prevents illegitimate children from inheriting based solely on their illegitimate status. The State has an interest in the just and orderly disposition of property at death.

IN RE WILLIAMS

[246 N.C. App. 76 (2016)]

Appeal by Kamari Antonious Krider, by and through his court-appointed Guardian ad litem, Khadaijah Chardonnay Krider, from an order entered 2 January 2015 by Judge John W. Bowers in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 November 2015.

Arnold & Smith, PLLC, by J. Bradley Smith, Matthew R. Arnold, and Paul A. Tharp, for Petitioner-Appellant.

Hunter & Everage, by Charles Ali Everage and Charles W. Hinnant, for Respondent-Appellee.

HUNTER, JR., Robert N., Judge.

Kamari Krider ("Krider"), appeals from an order holding he was not an heir to his putative father's estate. On appeal, Krider argues La-Reko Williams ("Williams") substantially complied with North Carolina's legitimization requirements and challenges the constitutionality of the legitimization statute as applied. After review, we uphold the trial court's order.

I. Factual and Procedural History

Williams died intestate on 20 July 2011. Victor Williams and Temako McCarthy, the biological parents of Williams , served as administrators of Williams' estate. The Letters of Administration for said administrators were filed on 25 August 2011. On 23 July 2014, Khadaijah Chardonnay Krider, natural mother of Krider, filed verified motions in the cause alleging that Krider was the sole heir to Williams's estate as Williams was Krider's natural father. Attached to the verified motions were Krider's birth certificate and an Affidavit of Parentage for Child Born Out of Wedlock. Krider proffered both documents as evidence that he was the sole heir of Williams under N.C. Gen. Stat § 29-15(1). Krider requested relief in the form of a temporary restraining order and preliminary injunction freezing the assets of Williams's estate and recovering all Williams's assets possessed by outside parties and placing them with the Clerk of Superior Court pending a hearing of whether Krider was the sole heir. Krider additionally requested relief in the form of a preliminary injunction demanding the Clerk of Superior Court place all property of Williams's estate in a trust for the benefit of Krider.

On 23 July 2014, the administrators of Williams's estate filed an answer to Krider's verified motions in the cause. The answer denied Williams was Krider's natural father and denied that Krider was a beneficiary of Williams's estate under N.C. Gen. Stat. § 29-15(1).

On 12 August 2014, the Clerk of Superior Court conducted a hearing on Krider's motions. On 23 September 2014, the Clerk entered an order providing the following findings of fact:

> 1. The minor child Kamari Antonious Krider was born out of wedlock.
>
> 2. The putative father La-Reko A. Williams had not legitimated the child pursuant to the provisions of G.S. 49-1 through 49-9 or the provision of G.S. 49-14 through 49-16. G.S. 29-19(b)(1).
>
> 3. The putative father La-Reko A. Williams also did not comply with N.C.G.S. 29-19 by filing an appropriate written acknowledgment of paternity with the Clerk of Superior Court during his and the child's lifetimes.
>
> 4. No DNA testing for paternity has ever been performed.
>
> 5. An Affidavit of Parentage for Child Born Out of Wedlock appears to have been signed at the hospital by La-Reko Antonious Williams . . .
>
> 6. Attorneys for the minor child made no argument for legitimation pursuant to the statute-G.S. 29-19-rather a U.S. Constitution, 14th Amendment, equal protection argument was made asserting that the State statute was unconstitutional in that equal protection was denied to illegitimate children.

As a result of the findings of fact, the Clerk of Superior Court made the following conclusions of law:

> 1. The minor child, Kamari A. Krider, has not been legitimated pursuant to the laws of this State.
>
> 2. The State has a substantial and important interest for the just and orderly disposition of property at death.
>
> 3. This State's statutory requirements do not violate the Equal Protection or Due Process Clauses of the U.S. Constitution. *Estate of Stern v. Stern*, 66 N.C. App. 507, 311 S.E.2d 909 (1984), appeal dismissed, 471 U.S. 1011 (1985).

Based on the findings of fact and conclusions of law, the court held that Krider was not an heir of Williams's estate. Krider appealed to Mecklenburg County Superior Court and filed a motion for a temporary

restraining order and preliminary injunction on 3 October 2014. He alleged facts that tended to show the following: Krider was born on 22 April 2011. Witness testimony, a certificate of live birth, and a signed Affidavit of Parentage by Williams were presented as evidence during the heir determination hearing. Krider contended this evidence proved he is the natural son and sole legal heir of Williams. Additionally, Krider argued at the heir determination hearing that he was denied due process and equal protection of the laws because he could not inherit from Williams due to his illegitimate status.

Following the facts alleged, Krider requested the following relief: a temporary restraining order and preliminary injunction freezing all funds/property/accounts held in the name of or on behalf of Williams's estate and a Superior Court trial to reexamine the Clerk's 23 September 2014 order.

The administrators of Williams's estate filed a reply on 30 October 2014. They requested dismissal with prejudice. The parties were heard on 17 December 2014 and 19 December 2014. The trial court filed an order on 2 January 2015. The trial court made the following findings:

> 1. The applicable statute as to whether the minor child Krider is a legitimate heir of La-Reko Williams is N.C. Gen. Stat. § 29-19. . . .
>
> 10. That Krider was born April 22, 2011.
>
> 11. That La-Reko Antonious Williams died on July 20, 2011.
>
> 12. The Court finds that an "Affidavit of Parent for Child Born Out of Wedlock" appears to have been signed by La-Reko Antonious Williams.
>
> 13. The Affidavit was not filed with the Clerk of Court.
>
> 14. The form Affidavit of Parentage for Child Born out Wedlock explains on the back that "[t]he execution and filing of this Affidavit with the registrar does not affect inheritance rights unless it is also filed with the clerk of the court in the county where the father resides. . . ."
>
> 17. That Krider does not meet the requirements for intestate succession set forth in N.C. Gen. Stat. § 29-19(b).
>
> 18. The constitutionality of N.C. Gen. Stat. § 29-19 has been previously upheld in *Mitchell v. Freuler*, 297 N.C.

206, 254 S.E.2d 762 (1979) and *Outlaw v. Planters Nat. Bank & Trust Co.*, 41. N.C. App. 571, 255 S.E.2d 189 (1979) finding that the Equal Protection and Due Process Clauses of the Constitution are not violated because the statute is substantially related to the permissible state interests the statute was to promote.

19. The *Mitchell* court identified the state's interests as follows: "(1) to mitigate the hardships created by our former law (which permitted illegitimates to inherit only from the mother and from each other); (2) to equalize insofar as practical the inheritance rights of legitimate and illegitimate children; and (3) at the time to safeguard the just and orderly disposition of a decedent's property and the dependability of titles passing under intestate laws." *Mitchell* at 216, 254 S.E.2d 762.

20. The legislature amended N.C. Gen. Stat. § 29-19(b) in 2013 to add a new and additional method to legitimate a child born out of wedlock through the use of a DNA test for a "person who died prior to or within one year after the birth of the child." N.C. Gen. Stat. § 29-19(b)(3) (2013). . . .

22. N.C. Gen. Stat. § 29-19(b)(3) does not apply to Krider as the provision only applies to estates of persons who died after June 26, 2013.

23. Counsel for Krider argues that N.C. Gen. Stat. N.C. Gen. Stat. § 29-19 is unconstitutional in as much as it denies equal protection to illegitimate children.

24. Krider contends that [section] 29-19(b)(3) is unconstitutional as applied because it discriminates against illegitimate children with no apparent grounds for doing so and creates a separate class of individuals for whom the statute will not assist with no apparent grounds by excluding persons born prior to June 26, 2013 from utilizing this section of the statute. . . .

27. The Court is aware that the effective date of the statute prevents Krider from using the provisions of N.C. Gen. Stat. § 29-19(b)(3) (2013) and that this creates a harsh result. However, the Court finds this does not create an equal protection or due process violation.

> 28. The Court accordingly finds that the Clerk's conclusions of law are supported by the findings of fact and that the Order is consistent with the conclusions of law and applicable law.

Based on its findings, the trial court affirmed the Clerk's 23 September 2014 order declaring Krider was not a legal heir of Williams's estate. On 7 Jan 2015, Krider filed a notice of appeal.

II. Jurisdiction

Jurisdiction lies in this court pursuant to N.C. Gen. Stat § 7A-27(b).

III. Standard of Review

The standard of review for alleged violations of constitutional rights is *de novo*. *State v. Tate*, 187 N.C. App. 593, 599, 653 S.E.2d 892, 897 (2007).

Pursuant to N.C. Gen. Stat. § 1-301.3(d), a superior court reviews an heir determination order from a clerk to determine (1) whether the findings of fact are supported by the evidence; (2) whether the conclusions of law are supported by the findings of facts; and (3) whether the order or judgment is consistent with the conclusions of law and applicable law. N.C. Gen. Stat. § 1-301.3(d) (2005). Appellate review is the same as that of the superior court. *In re Williams*, 208 N.C. App. 148, 151, 701 S.E.2d 399, 401 (2010).

IV. Analysis

A. Substantial Compliance

[1] Appellant argues that Williams's substantial compliance with N.C. Gen. Stat. § 29-19(b)(2) should establish Appellant as a legal heir of Williams's estate. N.C. Gen. Stat. § 29-19(b) states that "for purposes of intestate succession, a child born out of wedlock shall be entitled to take by through and from…(2) any person who has acknowledged himself during his own lifetime and the child's lifetime to be the father of the child in a written instrument executed or acknowledged before a certifying officer named in G.S. 52-10(b) and filed during his own lifetime and the child's lifetime in the office of the clerk of superior court where either he or the child resides." N.C. Gen. Stat. § 29-19(b)(2) (2013). Thus, N.C. Gen. Stat. § 29-19(b)(2) allows legitimation to occur if the unwed father acknowledges the child while both the father and child are living through the signing, notarization and filing of an Affidavit of Parentage with the office of the clerk of the superior count where either the father or child resides. *Id.*

Failure to meet the exact requirements of the statute leaves the child in an illegitimate status for intestate succession purposes. *Hayes v. Dixon*, 83 N.C. App. 52, 54–55, 348 S.E.2d 609–610 (1986). This Court recognizes "an illegitimate child's right to inherit from her putative father is established only via strict compliance with [section 29-19(b)(2)]" and as such "that a putative father's acknowledgment of paternity before a notary public and execution of an 'Affidavit Of Parentage For Child Born Out Of Wedlock' did not comply with the statutory provisions of [§ 29-19(b)(2)] when such acknowledgment was never filed." *In re Williams*, 208 N.C. App. 148, 152, 701 S.E.2d 399, 401–02 (2010) (citing *In re Estate of Morris*, 123 N.C. App. 264, 266–67, 472 S.E.2d 786, 787 (1996)).

Appellant fails to refute the principle that strict compliance with section 29-19(b)(2) is required, and instead argues substantial compliance should be the law. Appellant's argument for substantial compliance relies exclusively on the dissent in *Estate of Stern v. Stern*, 66 N.C. App. 507, 512–22, 311 S.E.2d 909, 912–17 (1984). In *Stern*, the dissent determined section 29-19(b)(2) is a remedial statute because one of the purposes in enacting section 29-19(b)(2) was the "mitigat[ion of] hardships created by former law (which permitted illegitimates to inherit only from the mother and from each other)." *Id.* at 516, 311 S.E.2d at 914. Therefore, like other remedial statutes, section 29-19(b)(2) is required to be "liberally construed as a whole in the light of the evils sought to be eliminated, the remedies intended to be applied, and the objective to be attained." *Id.* (citing *Puckett v. Sellars*, 235 N.C. 264, 266, 69 S.E.2d 497, 498 (1952)). As a result, the dissent concluded that constructive compliance should be the law because it would "further the remedial purposes of the statute and attain the objectives of equalization of the inheritance rights of legitimate and illegitimate children and their heirs." *Id.*

However, Appellant's reliance on the dissent in *Stern* is misplaced because it has not been accepted as binding law by our courts. As noted above, strict compliance remains the law. *Morris*, 123 N.C. App. at 266–67, 472 S.E.2d at 787 (1996) ("Although we are aware of cases commenting upon constructive compliance, the doctrine has not been specifically recognized in North Carolina.") (citing *Hayes*, 83 N.C. App. at 54, 348 S.E.2d at 610.) In fact, this Court affirmed strict compliance in the majority opinion of *Stern v. Stern*, 66 N.C. App. at 510, 311 S.E.2d at 911. Thus, Appellant's request to read substantial compliance into the statute must fail. As in *Morris*, Williams executed an Affidavit of Parentage before a notary public but never filed the affidavit. As such, Appellant still remains in an illegitimate status per section 29-19(b)(2). We are aware

that the result of our decision means that a child potentially suffers an unfair outcome. However, despite Appellant's plight,

> when, as here, the statutory language is clear and unambiguous, there is no room for judicial construction and the court must give the statute its plain meaning without superimposing provisions or limitations not contained therein. As this Court has recognized, G.S. 29-19 mandates what at times may create a harsh result. It is not, however, for the courts but rather for the legislature to effect any change.

Morris, 123 N.C. App. at 267, 472 S.E.2d at 788.

B. Constitutional Challenge

[2] Appellant challenges the constitutionality of section 29-19(b)(2) under the Equal Protection Clause of the U.S. Constitution and contends the statute prevents illegitimate children from inheriting from their fathers based solely on their illegitimate status. Classifications based on illegitimacy are subject to intermediate scrutiny. The State must prove the classification is substantially related to permissible state interests; otherwise, the classification violates the Equal Protection Clause. *Lalli v. Lalli*, 439 U.S. 259, 265 (1978). This means section 29-19(b)(2) must "not broadly discriminate between legitimates and illegitimates without more, but be carefully tuned to alternative considerations." *Mathews v. Lucas*, 427 U.S. 495 (1976).

The State interest in section 29-19(b)(2) is the "just and orderly disposition of property at death." *Outlaw*, 41 N.C. App. at 574–75, 255 S.E.2d at 191. This Court and the N.C. Supreme Court have recognized that such a state interest is permissive and that the classification based on illegitimacy created by section 29-19(b)(2) is substantially related to that permissive state interest. *Id.*; *see also Mitchell v. Freuler*, 297 N.C. 206, 216, 254 S.E.2d 762, 768 (1979). In *Outlaw*, this Court held:

> [Section 29-19] insofar as it provide[s] that an illegitimate child may inherit from its father only if paternity has been acknowledged in writing or finally adjudged in the lifetime of the father and otherwise in accord with those applicable statutes, establish[es] a statutory scheme which bears an evident and substantial relation to the permissible and important interest of the State in providing for the just and orderly disposition of property at death… [t]herefore, we find that the statutory scheme established

> by G.S. 29-19…does not discriminate against illegitimate children in such manner as to violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

Outlaw, 41 N.C. App. at 574–75, 255 S.E.2d at 191. The holding of *Outlaw* mirrors the U.S. Supreme Court decision in *Lalli*, which held a New York statute that required a formal legitimization method[1] via judicial decree[2] did not violate the Equal Protection Clause because such a formal legitimization method is substantially related to the permissive state interest in just and orderly disposition of property at death. *Lalli*, 439 U.S. at 275. The Court reasoned that statutes imposing formal legitimization methods for establishing legitimacy of children were substantially related to the permissive state interest of just and orderly disposition of property at death because without formal requirements, estates could never be officially declared final per court decree and thus proper ownership of estate property would remain unknown. *Id.* at 270 ("[H]ow [can the courts] achieve finality of decree in any estate when there always exists the possibility however remote of a secret illegitimate lurking in the buried past of a parent or an ancestor of a class of beneficiaries? Finality in decree is essential in the…. courts since title to real property passes under such decree.").

Appellant does not dispute any of the above decisions, but instead relies on *Cty. Of Lenoir ex rel. Cogdell v. Johnson*, 46 N.C. App. 182, 264 S.E.2d 816 (1980) as evidence that section 29-19(b)(2) is unconstitutional. In *Lenoir*, our Supreme Court determined the constitutionality of a child support statute that limited "the time in which an action to establish the paternity of an illegitimate must be commenced" to three years. *Id.* at 183–84, 264 S.E.2d at 818. A child who had not commenced the action within the three-year period forfeited all rights to child support from the putative parent. *Id.* at 184, 264 S.E.2d at 818. This Court, applying the intermediate scrutiny test, declared the statute of

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1. The phrase "formal legitimization method" means methods of legitimizing illegitimate children so they can inherit from their unwed parents via intestate succession.

2. It is important to note that the holding of *Lalli* extends to most formal methods of legitimization. *See Lalli*, 439 US at 272, n. 8 ("In affirming the judgment below, we do not, of course, restrict a State's freedom to require proof of paternity by means other than a judicial decree. Thus, a State may prescribe any formal method of proof [including any] regularized procedure that would assure the authenticity of the acknowledgement.").

limitations unconstitutional because the statute of limitations was not substantially related to the declared state interest in "preventing the litigation of stale or fraudulent claims." *Id.* at 188, 264 S.E.2d at 821. This Court based its determination on two things. First, since a minor is entitled to child support until age 18, the three-year statute of limitations could not be substantially related to preventing stale claims, but rather it treaded upon another state interest, preventing illegitimate children from becoming public charges. Second, there is no substantial relationship between preventing fraudulent child support claims and the three-year period because "[t]he mere passage of a certain amount of time before the custodial parent sues for child support has no logical connection with whether the noncustodial parent is or is not the actual parent." *Id.* at 188–89, 264 S.E.2d at 821.

Appellant's reliance on *Lenoir* is misplaced because *Lenoir* concerned a statute whose statute of limitations affected an illegitimate child's ability to acquire child support from a putative parent. As the majority pointed out in *Lalli*, cases involving statutes that create classifications based on illegitimate status and prevent an illegitimate child from acquiring child support (i.e., *Lenoir*) are readily distinguishable from cases involving classifications affecting an illegitimate child's ability to inherit via intestate succession. *See Lalli*, 439 U.S. at 268 n.6. The latter type of case involves a substantial state interest in just and orderly disposition of property at death, while the former type of case does not. *See Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 170 (1972). Therefore, *Lenoir* is not applicable.

Pursuant to the case law of the U.S. Supreme Court, the N.C. Supreme Court and this Court, Appellant's request to declare N.C. Gen. Stat. § 29-19(b)(2) unconstitutional must be denied.

V. Conclusion

For the foregoing reasons, we affirm the final judgment of the trial court.

AFFIRMED.

Chief Judge McGee and Judge Stephens concur.

JILLIAN MURRAY, PLAINTIFF
v.
UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, DEFENDANT

No. COA15-375

Filed 1 March 2016

1. Appeal and Error—interlocutory orders and appeals—preservation of issues—denial of motion to dismiss

An appeal from the denial of a motion to dismiss under N.C.G.S. § 8C-1, Rule 12(b)(1) (subject matter jurisdiction) was dismissed as interlocutory without reaching the merits of defendant's underlying sovereign immunity argument.

2. Appeal and Error—mootness—not properly raised

The Court of Appeals had no jurisdiction over a mootness issue where defendant did not raise its mootness argument in its statement of grounds for appellate review. Regardless, mootness is properly raised as an issue of subject matter jurisdiction through a motion under N.C.G.S. § 8C-1, Rule 12(b)(1), and the denial of a motion to dismiss on those grounds is interlocutory and not immediately appealable.

Judge TYSON dissenting.

Appeal by defendant from order entered 6 November 2014 by Judge Carl R. Fox in Orange County Superior Court. Heard in the Court of Appeals 22 September 2015.

The Law Firm of Henry Clay Turner, PLLC, by Henry Clay Turner, for plaintiff-appellee.

Attorney General Roy Cooper, by Assistant Attorney General Laura Howard McHenry, for defendant-appellant.

GEER, Judge.

Defendant, the University of North Carolina at Chapel Hill, appeals the superior court's denial of its motion to dismiss plaintiff Jillian Murray's complaint. Although acknowledging that this appeal is interlocutory, defendant argues that it is entitled to appeal because the trial court denied its motion to dismiss on sovereign immunity grounds.

However, we are bound by *Can Am S., LLC v. State*, ___ N.C. App. ___, ___, 759 S.E.2d 304, 307, *disc. review denied*, 367 N.C. 791, 766 S.E.2d 624 (2014), in which this Court, after surveying the controlling authority, held that when a defendant raises the issue of sovereign immunity under Rule 12(b)(1) of the Rules of Civil Procedure, a denial of that motion is not immediately appealable. Since the only sovereign immunity argument preserved below raised the issue under Rule 12(b)(1), this Court does not have jurisdiction over this appeal. Although defendant also argues that this case is moot, defendant has not made any argument that this Court has jurisdiction over that issue in the absence of a proper appeal of the sovereign immunity issue. We, therefore, dismiss the appeal.

Facts

Plaintiff's complaint alleges the following facts. On 12 January 2013, plaintiff, a student at defendant university, was violently sexually assaulted by a fellow classmate. Plaintiff emailed Dean Blackburn, the Associate Dean of Students for defendant, and requested information regarding the rights of sexual assault victims. Dean Blackburn failed to respond to plaintiff's inquiry for 20 days. On 4 February 2013, Dean Blackburn wrote to plaintiff, stating that her request "simply got lost in [his] inbox" and indicated that Desiree Rieckenberg, the Associate Dean and Student Complaint Coordinator, would contact her in the next 24 hours.

On 22 February 2013, plaintiff was allowed to meet with Dean Rieckenberg, who informed plaintiff that defendant's Title IX grievance system was in a "state of transition" and that she would "tell someone appropriate and get back in touch" with her. Dean Rieckenberg never provided plaintiff with defendant's sexual misconduct policy, never advised her of her rights under the policy, and never contacted her again. Plaintiff alleged that she became despondent and depressed due to the trauma from the assault and defendant's lack of response to her allegations and was unable to complete her spring semester.

Around January 2014, plaintiff told her parents about the sexual assault and the lack of response from defendant when she tried to report it. Plaintiff and her parents reached out to officials of defendant, but were informed that defendant did not regard her reports as "a formal complaint" under its Title IX policy. On 29 January 2014, plaintiff wrote to E.W. Quimbaya-Winship[1] that she was "a victim of sexual assault"

1. No job title for this individual is stated in plaintiff's complaint.

and that she "would like to make a formal report" regarding the assault. Plaintiff accepted Mr. Quimbaya-Winship's offer to make a complaint over the phone on 31 January 2014.

At the time of plaintiff's complaint, defendant had in place a sexual misconduct policy titled defendant's "Policy on Prohibited Harassment, Including Sexual Misconduct, and Discrimination." The policy provided that defendant would "promptly investigate and prepare a confidential Investigation Report within forty-five (45) calendar days of receiving the complaint, unless an extension of time is necessary in order to conduct a thorough and accurate investigation." If such extension of time was found to be necessary, the policy stated that defendant would provide the parties with written notification of the revised deadline for the report's completion.

On 21 February 2014, plaintiff and her parents met with officials of defendant and spoke with Title IX investigators, including Jayne Grandes and Kim Dixon. Investigator Grandes was assigned to investigate plaintiff's complaint on 5 March 2014, and Investigator Dixon was assigned to co-investigate it on 24 March 2014. Investigator Grandes emailed plaintiff on 17 April 2014, 76 days after plaintiff filed her 31 January 2014 complaint, and notified her that the date for completion of the investigation had been extended to 19 May 2014, 108 days after the date plaintiff filed her complaint. Investigators Grandes and Dixon submitted their report to defendant's Title IX coordinator on 19 May 2014. The report found "good cause to proceed to Informal or Formal Resolution of the complaint, as outlined in Sections IV and V of Appendix C to the Policy."

On 11 July 2014, Professor Robert P. Joyce emailed plaintiff to inform her that he had appointed himself chair of her grievance procedure and had appointed Clair McLaughlin, an undergraduate student with little Title IX training, no legal training, and only intermittent internet access because she was spending the summer in the Philippines, as plaintiff's "advisor." In addition, Professor Joyce informed plaintiff that pursuant to "Section V.E.2 of the Policy" plaintiff was entitled to "have a support person present in addition to [the] appointed advisor[,]" and the policy stated "[t]hat support person may be an attorney." At that time, section V.E.2 of Appendix C of the policy stated: "[t]he support person, who may be legal counsel, may privately consult with and advise a party but may not question witnesses or otherwise directly participate in the proceedings."

On 24 July 2014, Bernard Burk, the new panel chair, emailed plaintiff a document titled "Notice of Procedures Governing Student Grievance

Hearing," which applied only to plaintiff's specific grievance procedure. The document stated that an attorney could be present only as a "Support Person" and would not be entitled to receive direct communications on behalf of the student he represents. It also stated:

> your Support Person may participate fully in the proceedings in any way that you yourself may participate. Thus your Support Person may, if you wish, address the Panel and question witnesses *other than the opposing party* (under the Policy, the parties may be questioned only by the Panel).

In addition, it explained:

> You are responsible for communicating with your attorney or non-attorney support person ("Support Person") . . . . If contacted by your Support Person about matters related to the hearing, I will send my response to you (with a copy to the other party) and request that you communicate my response to your Support Person.

On 29 July 2014, Henry C. Turner notified defendant that he represented plaintiff in the grievance procedure, asked that he be appointed as her attorney in place of her student advisor, and requested that all correspondence be directed to him. Mr. Burk sent a response to plaintiff on the same day, without copying Mr. Turner, stating that "it is the practice under the University's Title IX Policy for the Panel Chair to communicate with the parties, and, if requested, their Advisors. Panel Chairs do not communicate directly with any attorney . . . [.]" On 7 August 2014, Mr. Turner was made aware that plaintiff's grievance proceeding was scheduled for 22 August 2014, after his requests to participate fully in the proceeding were rejected, and he was not informed of the place of the proceeding.

On 20 August 2014, plaintiff filed a verified complaint against defendant, seeking a declaratory judgment that defendant's sexual assault grievance procedure was unlawful. She requested a temporary restraining order and preliminary and permanent injunctive relief.

In her complaint, plaintiff contended that defendant's sexual misconduct policy violated N.C. Gen. Stat. § 116-40.11(a), stating:

> "[a]ny student enrolled at a constituent institution who is accused of a violation of the disciplinary or conduct rules of the constituent institution shall have the right to be represented, at the student's expense, by a licensed attorney

> or nonattorney advocate who may ***fully participate*** during any disciplinary procedure or other procedure adopted and used by the constituent institution regarding the alleged violation."

Further, plaintiff cited to Title IX requirements for hearings on sexual assault and harassment, in which the U.S. Department of Education's Office of Civil Rights stated: " '[w]hile OCR does not require schools to permit parties to have lawyers at any stage of the proceedings, if a school chooses to allow the parties to have their lawyers participate in the proceedings, **it must do so equally for both parties**.' "

Defendant responded to plaintiff's complaint by filing a motion to dismiss on 19 September 2014, in which defendant asserted that pursuant to Rules 12(b)(1) and/or 12(b)(6) of the Rules of Civil Procedure, plaintiff's complaint should be dismissed for "mootness, lack of standing, lack of subject matter jurisdiction, and failure to state a claim upon which relief may be granted." In its motion, defendant argued that "[t]he questions originally in controversy between the parties are no longer at issue" and that "[w]ith no justiciable controversy ripe for determination presented in Plaintiff's Complaint, the issues raised in the Complaint are moot." Further, defendant claimed that "Plaintiff lack[ed] standing to bring the present case." Finally, defendant asserted that "[t]he Court lacks subject matter jurisdiction over Plaintiff's claims" and that "Plaintiff has failed to state a claim upon which relief may be granted."

Plaintiff filed a brief in opposition to defendant's motion to dismiss on 13 October 2014. In her brief, plaintiff asserted that defendant's motion should be denied because plaintiff's Title IX sexual assault grievance had not " 'concluded.' " Plaintiff explained that defendant filed its motion to dismiss prior to the expiration of the deadline for plaintiff's sexual assailant to appeal the findings of plaintiff's student grievance hearing, so the issues in the case were not moot and should not be dismissed. Additionally, plaintiff argued that even if the cause of action became moot, the case should nevertheless continue to be heard under the "public interest exception" to the mootness doctrine.

The trial court held a hearing on defendant's motion to dismiss on 15 October 2014 in Orange County Superior Court. Although defendant's motion to dismiss had made no mention of sovereign immunity and was solely based on Rules 12(b)(1) and 12(b)(6), defendant argued at the hearing that the complaint should be dismissed pursuant to Rules 12(b)(1) and 12(b)(2) based on the doctrine of sovereign immunity.

On 6 November 2014, the trial court entered an order denying defendant's motion to dismiss. In the order, the trial court stated:

> **THIS MATTER CAME ON FOR A HEARING** before the undersigned Superior Court Judge Presiding during the 20 August 2014 Civil Session of Orange County Superior Court upon Defendant's Motion to Dismiss, pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. After considering the arguments of counsel, the Complaint, the Motion, and the briefs and other submissions of the parties, the Court finds that it possesses subject matter jurisdiction over this action and that the Plaintiff's complaint has made allegations sufficient to state a claim upon which relief may be granted under some legal theory.

Defendant appealed the order to this Court.

Discussion

[1] We must first address whether this Court has jurisdiction to hear this appeal from the trial court's denial of defendant's motion to dismiss. "Typically, the denial of a motion to dismiss is not immediately appealable to this Court because it is interlocutory in nature." *Reid v. Cole*, 187 N.C. App. 261, 263, 652 S.E.2d 718, 719 (2007). " 'An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.' " *Britt v. Cusick*, 231 N.C. App. 528, 530-31, 753 S.E.2d 351, 353 (2014) (quoting *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)).

Defendant contends, however, that this appeal is properly before the Court because the trial court rejected defendant's claim that the action was barred by sovereign immunity. Defendant argues that the order therefore affects a substantial right that would be lost in the absence of an immediate appeal. *See* N.C. Gen. Stat. § 1-277(a) (2015) (authorizing interlocutory appeal of order that "affects a substantial right"). In addressing defendant's arguments, we are bound by *Can Am*.

In *Can Am*, the defendants moved to dismiss on sovereign immunity grounds under Rule 12(b)(1) for lack of subject matter jurisdiction and Rule 12(b)(2) for lack of personal jurisdiction, "but notably not Rule 12(b)(6) . . . ." ___ N.C. App. at ___, 759 S.E.2d at 307. Although the defendants had moved to dismiss for failure to state a claim for relief under Rule 12(b)(6), they based their Rule 12(b)(6) motion on the plaintiff's

failure to adequately plead an actual controversy and not on the sovereign immunity doctrine. *Id.* at ___, 759 S.E.2d at 308.

This Court held in *Can Am* that "[h]ad defendants moved to dismiss based on the defense of sovereign immunity pursuant to Rule 12(b)(6), we would be bound by the longstanding rule that the denial of such a motion affects a substantial right and is immediately appealable under section 1-277(a)." *Id.* at ___, 759 S.E.2d at 307. *See also Green v. Kearney*, 203 N.C. App. 260, 266, 690 S.E.2d 755, 761 (2010) ("This Court has held that a denial of a Rule 12(b)(6) motion to dismiss on the basis of sovereign immunity affects a substantial right and is immediately appealable."), *aff'd per curiam*, 367 N.C. 113, 748 S.E.2d 143 (2013). However, since the defendants had only based their sovereign immunity defense on a lack of either subject matter jurisdiction under Rule 12(b)(1) or personal jurisdiction under Rule 12(b)(2), that longstanding rule was inapplicable. *Can Am*, ___ N.C. App. at ___, 759 S.E.2d at 307.

The Court next concluded that the defendants' Rule 12(b)(1) motion could not justify an interlocutory appeal because "[a] denial of a Rule 12(b)(1) motion based on sovereign immunity does not affect a substantial right [and] is therefore not immediately appealable under section 1-277(a)." *Id.* at ___, 759 S.E.2d at 307. *See also Green*, 203 N.C. App. at 265-66, 690 S.E.2d at 760 ("[T]his Court has declined to address interlocutory appeals of a lower court's denial of a Rule 12(b)(1) motion to dismiss despite the movant's reliance upon the doctrine of sovereign immunity."); *Meherrin Indian Tribe v. Lewis*, 197 N.C. App. 380, 385, 677 S.E.2d 203, 207 (2009) (holding "defendants' appeal from the denial of their Rule 12(b)(1) motion based on sovereign immunity is neither immediately appealable pursuant to N.C. Gen. Stat. § 1-277(b), nor affects a substantial right.").

In *Can Am*, this Court concluded its analysis of the jurisdictional issue by addressing Rule 12(b)(2) motions invoking the sovereign immunity doctrine. This Court pointed out that "beginning with *Sides v. Hospital*, 22 N.C.App. 117, 205 S.E.2d 784 (1974), *mod. on other grounds*, 287 N.C. 14, 213 S.E.2d 297 (1975), this Court has consistently held that: (1) the defense of sovereign immunity presents a question of personal, not subject matter, jurisdiction, and (2) denial of Rule 12(b)(2) motions premised on sovereign immunity are sufficient to trigger immediate appeal under section 1-277(b)." ___ N.C. App. at ___, 759 S.E.2d at 308.

As a result, the Court concluded in *Can Am* that it could consider the merits of the defendants' Rule 12(b)(2) motion to dismiss, concluding "[a]s has been held consistently by this Court, [that] denial of a Rule

12(b)(2) motion premised on sovereign immunity constitutes an adverse ruling on personal jurisdiction and is therefore immediately appealable under section 1-277(b)." *Id.* at ___, 759 S.E.2d at 308. *See also Data Gen. Corp. v. Cnty. of Durham*, 143 N.C. App. 97, 100, 545 S.E.2d 243, 245-46 (2001) ("[T]his Court has held that an appeal of a motion to dismiss based on sovereign immunity presents a question of personal jurisdiction rather than subject matter jurisdiction, and is therefore immediately appealable.").

In this case, as in *Cam Am*, although defendant's motion to dismiss referred to Rule 12(b)(6) as well as Rule 12(b)(1), the motion did not mention sovereign immunity. During the oral argument, where defendant raised the sovereign immunity doctrine for the first time, defendant relied only on Rules 12(b)(1) and 12(b)(2) in arguing that the complaint was barred by sovereign immunity and did not rely upon Rule 12(b)(6).[2] As *Can Am* emphasizes, to the extent that defendant relied on Rule 12(b)(1) in moving to dismiss on sovereign immunity grounds, that motion does not support an interlocutory appeal. ___ N.C. App. at ___, 759 S.E.2d at 308. Further, since neither defendant's written motion nor its oral argument at the hearing relied on Rule 12(b)(6) in connection with the sovereign immunity defense, the case law authorizing interlocutory appeals for denial of a Rule 12(b)(6) motion based on sovereign immunity does not apply.

With respect to Rule 12(b)(2), defendant did not assert a sovereign immunity defense based on Rule 12(b)(2) until the hearing, when defendant argued that it should not matter whether its sovereign immunity argument was brought under Rule 12(b)(1) or under Rule 12(b)(2). Even though defendant mentioned Rule 12(b)(2) in its oral argument, the trial court's order referred only to Rules 12(b)(1) and 12(b)(6) and made no reference to Rule 12(b)(2). Because defendant did not include Rule 12(b)(2) in its motion, the trial court reasonably confined its order to the bases asserted in the motion: Rules 12(b)(1) and 12(b)(6). *See* N.C.R. Civ. P. 7(b)(1) (providing that motion "shall be made in writing, shall

2. The dissent points to the transcript as showing that defendant did argue for dismissal on sovereign immunity. To the contrary, the case referenced by defense counsel in the quotation included in the dissent, held that a motion to dismiss based on sovereign immunity falls under Rule 12(b)(1) or 12(b)(2): "[T]he parties' briefs address the issue of sovereign immunity. A motion to dismiss based on sovereign immunity is a jurisdictional issue; whether sovereign immunity is grounded in a lack of subject matter jurisdiction or personal jurisdiction is unsettled in North Carolina." *M Series Rebuild, LLC v. Town of Mount Pleasant, Inc.*, 222 N.C. App. 59, 62, 730 S.E.2d 254, 257 (2012) (citing only cases involving 12(b)(1) and 12(b)(2)).

state with particularity the grounds therefor, and shall set forth the relief or order sought").

In addition, Rule 10(a)(1) of the Rules of Appellate Procedure provides that in order for a party to properly preserve an issue for appeal, the party not only must have raised the issue below, but "[i]t is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion." Since defendant did not take any action to obtain a ruling on its oral Rule 12(b)(2) motion, defendant did not preserve for appellate review the question whether the trial court erred in not applying the sovereign immunity doctrine under Rule 12(b)(2).

Notably, defendant does not argue on appeal that the trial court erred in failing to address Rule 12(b)(2) and, for that reason as well, the issue regarding denial of a motion to dismiss under Rule 12(b)(2) is not properly before us. It is well established that "[i]t is not the role of the appellate courts . . . to create an appeal for an appellant." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005).

Accordingly, since our role is simply to review the actions of the court below, we find no basis for concluding that this Court has jurisdiction over the appeal pursuant to Rule 12(b)(2). Because we do not have jurisdiction over defendant's appeal, we are required to dismiss it without reaching the merits of defendant's underlying sovereign immunity argument. *See Casper v. Chatham Cnty.*, 186 N.C. App. 456, 459-60, 651 S.E.2d 299, 302 (2007) (" 'If a court finds at any stage of the proceedings that it lacks jurisdiction over the subject matter of a case, it must dismiss the case for want of jurisdiction.' " (quoting *Sarda v. City/Cnty. of Durham Bd. of Adjustment*, 156 N.C. App. 213, 215, 575 S.E.2d 829, 831 (2003))).

[2] Defendant also contends on appeal that the trial court erred in denying its motion to dismiss on the grounds of mootness. Defendant did not, however, in its statement of the grounds for appellate review, make any argument that the trial court's denial of its motion to dismiss on the grounds of mootness affects a substantial right. And, it is not the role of this Court to find a justification for exercising jurisdiction. *See Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994) ("It is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order; instead, the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.").

Regardless, this Court has held that "mootness is properly raised through a motion under . . . Rule 12(b)(1)" as an issue of subject matter jurisdiction. *Yeager v. Yeager*, 228 N.C. App. 562, 565, 746 S.E.2d 427, 430 (2013). However, it is well established in North Carolina that "[a] trial judge's order denying a motion to dismiss for lack of subject matter jurisdiction is interlocutory and not immediately appealable." *Shaver v. N.C. Monroe Constr. Co.*, 54 N.C. App. 486, 487, 283 S.E.2d 526, 527 (1981). Therefore, we have no jurisdiction over the mootness issue and cannot address it.[3] Accordingly, we dismiss this appeal and remand for further proceedings.

DISMISSED AND REMANDED.

Judge BRYANT concurs.

Judge TYSON dissents in a separate opinion.

TYSON, Judge, dissenting.

The record shows plaintiff alleged and argued sovereign immunity under Rule 12(b)(6), and obtained the trial court's ruling on this issue. The majority's opinion holds this Court is without jurisdiction to hear defendant's appeal, because defendant only preserved its sovereign immunity argument under Rule 12(b)(1) (lack of subject matter jurisdiction), and not under Rules 12(b)(2) (lack of personal jurisdiction) and 12(b)(6) (failure to state a claim). I respectfully dissent from the majority's dismissal of defendant's appeal. I vote to review defendant's appeal on the merits, and reverse the trial court's denial of defendant's Rule 12(b)(6) motion to dismiss.

I. Rule 12(b)(6)

A. Jurisdiction to Hear Defendant's Appeal

Generally, the denial of a motion to dismiss is interlocutory and not immediately appealable to this Court. *Reid v. Cole*, 187 N.C. App. 261, 263, 652 S.E.2d 718, 719 (2007). Many precedents hold a denial of a Rule 12(b)(6) motion to dismiss on the basis of sovereign immunity affects a substantial right and is immediately appealable. *Green v. Kearney*, 203

3. In addition, defendant has filed a motion to supplement the record and take judicial notice of facts relating solely to the issue of mootness. Since that issue is not properly before us, we deny that motion.

N.C. App. 260, 266, 690 S.E.2d 755, 761 (2010); *see also Can Am v. State*, __ N.C. App. __, __, 759 S.E.2d 304, 307, *disc. review denied*, 367 N.C. 791, 766 S.E.2d 624 (2014) ("Had defendants moved to dismiss based on the defense of sovereign immunity pursuant to Rule 12(b)(6), we would be bound by the longstanding rule that the denial of such a motion affects a substantial right and is immediately appealable under [N.C. Gen. Stat. §] 1-277(a)."). The majority's holding that this "longstanding rule" is inapplicable "[s]ince the only sovereign immunity argument preserved below raised the issue under Rule 12(b)(1)" is error.

Defendant's motion to dismiss states defendant "moves to dismiss Plaintiff's Complaint pursuant to Rules 12(b)(1) and/or 12(b)(6) of the North Carolina Rules of Civil Procedure for mootness, lack of standing, *lack of subject matter jurisdiction*, *and failure to state a claim upon which relief may be granted*." (emphasis supplied). At the hearing, defendant's counsel correctly argued:

> First, it is well settled in North Carolina courts that the State is immune from suit, absent waiver or consent. Sovereign immunity extends to state agencies, which includes the University of North Carolina at Chapel Hill. Some court[s] have treated sovereign immunity as a 12(b)(1) defense while others have treated it as a 12(b)(2) defense. However, in Myers v. McGrady, the North Carolina Supreme Court referred to the sovereign immunity bar as: Fatal to jurisdiction without further specification.
>
> The party seeking access to the Court bears the burden of proving that the Court has subject matter jurisdiction. And when it appears by suggestion of the parties or otherwise that the Court lacks subject matter jurisdiction, the Court shall dismiss the action under Rule 12(h)(3). Furthermore, as held in M Series Rebuild LLC v. Town of Mount Pleasant, which I do have copies of for the Court if you would like to review it, the *plaintiff's complaint must affirmatively demonstrate the basis for waiver of immunity when suing a government entity. Here the complaint neither alleged a waiver of immunity nor demonstrated the basis for such a waiver. Accordingly, the complaint should be dismissed on sovereign immunity grounds.*

(emphasis supplied).

The majority's opinion fails to consider defendant's arguments and authorities cited, and incorrectly concludes defendant failed to assert sovereign immunity under Rule 12(b)(6) at the hearing. Rule 12(b)(6) allows a party to assert the immunity and move for a dismissal for the "failure to state a claim upon which relief can be granted." N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2015).

It is well-settled that "[i]n order to overcome a defense of [sovereign] immunity, the complaint must specifically allege a waiver of [sovereign] immunity. Absent such an allegation, the complaint *fails to state a cause of action*." *Green*, 203 N.C. App. at 268, 690 S.E.2d at 762 (citation omitted) (emphasis supplied). Defendant's argument to the trial court clearly raises Rules 12(b)(1), 12(b)(2), and 12(b)(6). Defense counsel clearly argues that plaintiff's complaint fails to state a claim by "neither alleg[ing] a waiver of immunity nor demonstrat[ing] the basis for such a waiver."

The trial court explicitly ruled on defendant's motion under Rule 12(b)(6) in the written order. The court found "that it possesses subject matter jurisdiction over this action and that the plaintiff's complaint has made allegations sufficient to state a claim upon which relief may be granted under some legal theory." (emphasis supplied).

The majority opinion's conclusion that defendant did not raise sovereign immunity under Rule 12(b)(6) is simply not supported and is contradicted by, the arguments of defendant's counsel at the hearing and on the record. The denial of a motion to dismiss on the grounds of sovereign immunity based on Rule 12(b)(6) is immediately appealable. Defendant raised and argued sovereign immunity under Rule 12(b)(6) before the trial court. *Id.* at 266, 690 S.E.2d at 761.

B. Denial of Defendant's 12(b)(6) Motion

1. Standard of Review

> On a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the standard of review is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. The complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief.

Holleman v. Aiken, 193 N.C. App. 484, 491, 668 S.E.2d 579, 584-85 (2008) (citation and quotation marks omitted).

"Dismissal is warranted (1) when the face of the complaint reveals that no law supports plaintiffs' claim; (2) *when the face of the complaint reveals that some fact essential to plaintiffs' claim is missing*; or (3) *when some fact disclosed in the complaint defeats plaintiffs' claim*." *Walker v. Sloan*, 137 N.C. App. 387, 392, 529 S.E.2d 236, 241 (2000) (citation and internal quotation marks omitted) (emphasis supplied).

"[T]he trial court regards all factual allegations of the complaint as true. Legal conclusions, however, are not entitled to a presumption of truth." *Id.* (citations omitted). This Court "conducts a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, 231 N.C. App. 70, 74, 752 S.E.2d 661, 663-64 (2013) (citation omitted).

2. Failure to Allege Waiver of Sovereign Immunity

Defendant argues the trial court erred by denying his motion to dismiss where the complaint fails to allege a waiver of sovereign immunity. I agree.

The doctrine of sovereign immunity is well settled in North Carolina courts:

> It is an established principle of jurisprudence, resting on grounds of sound public policy, that a state may not be sued in its own courts or elsewhere unless it has consented by statute to be sued or has otherwise waived its immunity from suit.

Welch Contracting, Inc. v. N.C. Dep't of Transp., 175 N.C. App. 45, 51, 622 S.E.2d 691, 695 (2005) (citing *Smith v. Hefner*, 235 N.C. 1, 6, 68 S.E.2d 783, 787 (1952)). Sovereign immunity applies in actions brought for declaratory relief, *Petroleum Traders Corp. v. State*, 190 N.C. App. 542, 547, 660 S.E.2d 662, 664 (2008), and extends to state agencies. *Welch*, 175 N.C. App. at 51, 622 S.E.2d at 695. The court lacks jurisdiction where the doctrine of sovereign immunity applies, and plaintiff's claim must be dismissed on jurisdictional grounds. *Id.* at 56, 622 S.E.2d at 698.

Sovereign immunity "is immunity from suit rather than a defense to liability." *Moore v. Evans*, 124 N.C. App. 35, 40, 476 S.E.2d 415, 420 (1996). This Court and our Supreme Court have repeatedly held: "In order to overcome a defense of governmental immunity, the complaint

must specifically allege a waiver of governmental immunity. *Absent such an allegation, the complaint fails to state a cause of action.*" *Paquette v. County of Durham*, 155 N.C. App. 415, 418, 573 S.E.2d 715, 717 (2002) (internal citations omitted) (emphasis supplied), *disc. review denied*, 357 N.C. 165, 580 S.E.2d 695 (2003). *See also Clark v. Burke County*, 117 N.C. App. 85, 88, 450 S.E.2d 747, 748 (1994) ("[A]bsent an allegation to the effect that [sovereign] immunity has been waived, *the complaint fails to state a cause of action.*" (emphasis supplied)). "While this principle has been applied primarily in cases involving counties or municipalities, this Court [has] held . . . that it is equally applicable in suits against the State and its agencies." *Fabrikant v. Currituck County*, 174 N.C. App. 30, 38, 621 S.E.2d 19, 25 (2004) (citing *Vest v. Easley*, 145 N.C. App. 70, 74, 549 S.E.2d 568, 573 (2001)).

It is undisputed that defendant is an agency of the State of North Carolina and enjoys sovereign immunity from suit. *See Welch*, 175 N.C. App. at 51, 622 S.E.2d at 695. Plaintiff's complaint asserts no cause of action against defendant without a specific allegation that defendant has waived sovereign immunity. "[A]s long as the complaint contains sufficient allegations to provide a reasonable forecast of waiver, precise language alleging that the State has waived the defense of sovereign immunity is not necessary." *Fabrikant*, 174 N.C. App. at 38, 621 S.E.2d at 25. Here, plaintiff's complaint is wholly silent and asserts no allegations, which support any lawful conclusion that defendant has "consented by statute to be sued or has otherwise waived its immunity from suit." *Welch*, 175 N.C. App. at 51, 622 S.E.2d at 695 (citations and quotation marks omitted).

II. Conclusion

Defendant's motion to dismiss alleges plaintiff's failure to state a claim under Rule 12(b)(6). At the hearing, defendant argued and cited authority to show plaintiff's complaint neither alleged a waiver of immunity nor demonstrated the basis for such a waiver, and should be dismissed on sovereign immunity grounds. The record clearly shows defendant raised sovereign immunity at the hearing under Rule 12(b)(6). This issue is properly before this Court.

Plaintiff's complaint fails to specifically allege defendant has "consented by statute to be sued or has otherwise waived its immunity from suit." *Id.* Plaintiff has failed to state a claim upon which relief can be granted. The trial court erred by denying defendant's motion to dismiss under Rule 12(b)(6). The order of the trial court should be reversed. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
SILVESTRE ALVARADO CHAVES

No. COA15-587

Filed 1 March 2016

Homicide—second-degree murder—failure to instruct—voluntary manslaughter—malice

The trial court did not err in a second-degree murder case by failing to instruct the jury on the lesser included offense of voluntary manslaughter. Although defendant contended he acted under heat of passion, it could not be concluded that either the victim's words, her conduct, or a combination of the two served as legally adequate provocation to negate the presumption of malice so as to require an instruction on voluntary manslaughter. Further, there was a lapse of time.

Appeal by defendant from judgment entered 29 August 2014 by Judge Michael J. O'Foghludha in Durham County Superior Court. Heard in the Court of Appeals 4 November 2015.

Roy Cooper, *Attorney General*, *by Kimberly D. Potter*, *Special Deputy Attorney General*, *for the State.*

Staples Hughes, *Appellate Defender*, *by Constance E. Widenhouse*, *Assistant Appellate Defender*, *for defendant-appellant.*

DAVIS, Judge.

Silvestre Alvarado Chaves ("Defendant") appeals from his conviction for second-degree murder. On appeal, he contends that the trial court erred by declining to instruct the jury on voluntary manslaughter. After careful review, we conclude that Defendant received a fair trial free from error.

Factual Background

The State presented evidence at trial tending to establish the following facts: In December of 2009, Defendant began dating Crystal Gigliotti ("Crystal"), and they began living together in an apartment in Durham, North Carolina in May of 2010. Their relationship subsequently deteriorated, and they frequently argued. The majority of their arguments

centered around Defendant's jealousy over Crystal's relationships with other men.

As a result of these arguments, Defendant would periodically leave their apartment and stay with his brother. On several occasions, Defendant displayed his anger over Crystal's conduct by "cut[ting] the lines on the washing machine and dryer and haul[ing] them out of the house" and "taking her cellphone and house phone." On another occasion, upon returning to the apartment and finding Crystal with another man, Defendant attacked both of them.

Around April or May of 2011, Crystal began seeing another man known only as "Marto."[1] On 3 May 2011, Crystal called and texted Defendant numerous times while he was at work. She asked him to come to the apartment that evening to pick up some of his belongings. She also requested that he let Marto know that Defendant and she were no longer in a relationship.

That evening, Defendant, who worked in the kitchen of a local Holiday Inn, took a knife from work and drove to Crystal's apartment. Upon Defendant's arrival at the apartment, Crystal asked him to call or text Marto from Defendant's cellphone for the purpose of informing Marto that her relationship with Defendant had ended. Crystal told Defendant she would have sexual intercourse with him if he agreed to do so. Defendant and Crystal proceeded to engage in sexual intercourse. Afterward, Crystal asked for his cellphone. Defendant refused her request at which point Crystal began taunting him in "Spanglish."

Defendant then left the apartment to take certain items belonging to him to his car. Upon returning to the apartment, he proceeded to stab Crystal repeatedly with the knife that he had taken from his workplace. Crystal died as a result of her stab wounds.

Defendant fled from the apartment in his car and called Crystal's parents on his cellphone, telling them to go to Crystal's apartment. Crystal's mother did so and discovered her body.

In the early morning hours of 4 May 2011, Defendant was pulled over on I-40 in Tennessee by Officer Johnnie Carter ("Officer Carter") after he observed Defendant driving 45 miles per hour in a 70 mile per hour zone. As Officer Carter approached Defendant's vehicle, he saw through the driver's side window Defendant stab himself several times in the

1. Throughout the trial transcript, "Marto" is at times referred to as "Matto," "Marta," and "Marlo." However, all of these spellings refer to the same individual.

"neck, upper left chest . . . [and] on his side" with a knife. Officer Carter broke the window, and his partner incapacitated Defendant by means of a Taser. Defendant was placed under arrest and taken to Regional Medical Center in Memphis, Tennessee.

On 6 May 2011, Defendant was interviewed at the hospital by Investigator Tim Helldorfer ("Investigator Helldorfer") with the Shelby County District Attorney General's Office in Memphis, Tennessee. On 10 May 2011, Investigator Helldorfer performed an additional interview with Defendant. During the course of the recorded interviews, Defendant confessed to stabbing Crystal and provided details concerning the events leading up to her death.

On 6 June 2011, Defendant was indicted for murder. On 15 October 2012, Defendant was also indicted on a charge of first-degree rape. A jury trial was held in Durham County Superior Court before the Honorable Michael J. O'Foghludha beginning on 18 August 2014. During the State's case, the recordings of Defendant's two interviews with Investigator Helldorfer were admitted into evidence and played for the jury.

At the charge conference, the trial judge informed the parties that he would be instructing the jury on theories of first-degree murder and second-degree murder as well as on charges of first-degree rape and assault on a female. Defendant's trial counsel requested that the jury also be instructed on the lesser included offense of voluntary manslaughter. After listening to the arguments of counsel and taking the request under advisement, the trial court ultimately denied Defendant's request.

The jury found Defendant guilty of second-degree murder and assault on a female. The trial court arrested judgment on the conviction for assault on a female and sentenced Defendant to 156-197 months imprisonment. Defendant gave oral notice of appeal in open court.

Analysis

Defendant's sole argument on appeal is that the trial court committed reversible error by refusing to instruct the jury on voluntary manslaughter. Specifically, he contends that such an instruction was warranted because the evidence at trial supported a finding that he acted in the heat of passion based upon adequate provocation. We disagree.

"Our Court reviews a trial court's decisions regarding jury instructions *de novo*." *State v. Jenkins*, 202 N.C. App. 291, 296, 688 S.E.2d 101, 105, *disc. review denied*, 364 N.C. 245, 698 S.E.2d 665 (2010). It is well settled that

> [a] defendant is entitled to have a lesser-included offense submitted to the jury only when there is evidence to support it. The test in every case involving the propriety of an instruction on a lesser grade of an offense is not whether the jury could convict defendant of the lesser crime, but whether the State's evidence is positive as to each element of the crime charged and whether there is any conflicting evidence relating to any of these elements.

State v. Bedford, 208 N.C. App. 414, 417, 702 S.E.2d 522, 526 (2010) (internal citations, quotation marks, and brackets omitted).

"Second-degree murder is the unlawful killing of a human being with malice, but without premeditation and deliberation. Malice may be express or implied and it need not amount to hatred or ill will, but may be found if there is an intentional taking of the life of another without just cause, excuse or justification." *State v. Robbins*, 309 N.C. 771, 775, 309 S.E.2d 188, 190 (1983) (internal citations omitted). Furthermore, "[i]f the State satisfies the jury beyond a reasonable doubt or if it is admitted that a defendant intentionally assaulted another with a deadly weapon, thereby proximately causing his death, two presumptions arise: (1) that the killing was unlawful and (2) that it was done with malice. Nothing else appearing, the person who perpetrated such assault would be guilty of murder in the second degree." *Id.* (citation omitted).

It is well established that "[v]oluntary manslaughter is distinguished from first and second-degree murder by the absence of malice. Malice is presumed from the use of a deadly weapon. Evidence of adequate provocation has to be present in order to rebut the presumption of malice." *State v. McMillan*, 214 N.C. App. 320, 327-28, 718 S.E.2d 640, 646 (2011) (internal citations omitted). "One who kills a human being under the influence of sudden passion, produced by adequate provocation, sufficient to negate malice, is guilty of manslaughter." *State v. Woodard*, 324 N.C. 227, 232, 376 S.E.2d 753, 755-56 (1989) (internal citations and quotation marks omitted). Our Supreme Court has explained that

> the heat of passion suddenly aroused by provocation must be of such nature as the law would deem adequate to temporarily dethrone reason and displace malice. Mere words however abusive are not sufficient provocation to reduce second-degree murder to manslaughter. Legal provocation must be under circumstances amounting to an assault or threatened assault.

State v. Montague, 298 N.C. 752, 757, 259 S.E.2d 899, 903 (1979) (internal citations omitted).

In the present case, Defendant does not contend that a conflict exists in the evidence as to the circumstances of Crystal's death. Rather, he contends that the undisputed facts give rise to an inference that he killed her in the heat of passion based upon sufficient provocation so as to entitle him to an instruction on voluntary manslaughter.

In addressing Defendant's argument, we find our Supreme Court's decision in *Woodard* instructive. In *Woodard*, the defendant was romantically involved with the victim during the year preceding her death. The victim also dated other men during this time frame. The defendant was jealous of these other men and made occasional threats towards them and the victim. *Woodard*, 324 N.C. at 228, 376 S.E.2d at 754.

One night, the defendant, suspecting that the victim was with another man at a nearby hotel, went to the hotel. Upon seeing her car there, he waited for her to leave and then followed her home. *Id.* at 229, 376 S.E.2d at 754. The defendant then confronted her in her front yard. She told him that she did not want to see him again, instructing him not to call her and to leave her alone. *Id.* The defendant led her to a flower bed a few feet away and began to hug and kiss her. She pulled away from him and began walking toward the front door of her house. The defendant pulled out a gun and fatally shot her in the back of the head. *Id.*

The defendant was convicted of first-degree murder. On appeal, he argued that the trial court had erred by refusing to instruct the jury on the lesser included offense of voluntary manslaughter based on his contention that he "killed the victim in the heat of passion caused by provocation adequate to negate the element of malice." *Id.* at 231-32, 376 S.E.2d at 755. Our Supreme Court rejected this argument, holding as follows:

> Assuming *arguendo* that there was some evidence from which a jury could find that defendant acted under a sudden heat of passion when he shot the victim, merely acting under the heat of passion is not enough to negate malice so as to reduce murder to manslaughter. Such sudden heat of passion must arise upon what the law recognizes as adequate provocation. In the instant case, the fact that the victim, who was not defendant's spouse, was dating other men is not adequate provocation to reduce this homicide from murder to manslaughter. Since there was no evidence from which the jury could properly find that

> defendant killed the victim while under the influence of sudden passion, *produced by adequate provocation*, sufficient to negate malice, the trial judge did not err in refusing to instruct the jury that it could find the defendant guilty of voluntary manslaughter.

Id. at 232, 376 S.E.2d at 756 (internal citation omitted).

In the present case, Defendant maintains that he acted in the heat of passion as a result of Crystal's insistence — shortly after they had engaged in sexual intercourse — that he allow his cellphone to be used to text another man that she and Defendant were no longer in a relationship. He further contends that when he refused this request, Crystal's subsequent taunting of him in "Spanglish" humiliated him. However, we are unable to conclude that either her words, her conduct, or a combination of the two served as legally adequate provocation to negate the presumption of malice so as to require an instruction on voluntary manslaughter.

Our Supreme Court has expressly held that "[m]ere words, *however abusive or insulting* are not sufficient provocation to negate malice and reduce the homicide to manslaughter. Rather, this level of provocation must ordinarily amount to an assault or threatened assault by the victim against the perpetrator." *State v. Watson*, 338 N.C. 168, 176-77, 449 S.E.2d 694, 700 (1994) (internal citations omitted and emphasis added), *cert. denied*, 514 U.S. 1071, 131 L.Ed.2d 569, *overruled on other grounds by State v. Richardson*, 341 N.C. 585, 592, 461 S.E.2d 724, 729 (1995).

Here, Defendant contends that Crystal's words — namely, her request that he help her explain to Marto that their relationship had ended and her verbal taunts — humiliated him. Based on *Woodard* and *Watson*, however, her statements did not constitute legally sufficient provocation to negate the presumption of malice.

Defendant's argument on this issue is also undercut by the evidence that Crystal had made a similar request regarding Marto earlier that day. Therefore, however upsetting it may have been for Defendant to hear it repeated just after he and Crystal had engaged in sexual intercourse, the fact remains that this was not the first time she had made the request to him.

Nor are we persuaded that adequate provocation existed as a result of Crystal's actions in allowing Defendant to have sexual intercourse with her in order to manipulate him into helping facilitate her relationship with Marto. While Defendant characterizes her conduct as a blatantly manipulative attempt to use Defendant's strong feelings for her in

order to further her own purposes at his expense, such conduct simply does not rise to the level of adequate provocation so as to require an instruction on voluntary manslaughter under the principles enunciated by our Supreme Court.

It is also important to note that there was a lapse in time between (1) their act of sexual intercourse, Crystal's request for Defendant's cellphone, and her taunting of him; and (2) Defendant's stabbing of her. Following her request for his cellphone after they had engaged in sexual intercourse, Defendant carried his personal belongings downstairs and placed them in his vehicle. Only then did he return to the apartment and kill Crystal. Thus, Defendant clearly had an opportunity to regain his composure during the interim. *See State v. Bare*, 77 N.C. App. 516, 522-23, 335 S.E.2d 748, 752 (1985) ("In order to succeed on this theory, there must be evidence that (1) defendant [acted] in the heat of passion; (2) defendant's passion was sufficiently provoked; and (3) *defendant did not have sufficient time for his passion to cool off*." (emphasis added)), *disc. review denied*, 315 N.C. 392, 338 S.E.2d 881 (1986).

Finally, the record reveals that Defendant stabbed Crystal 29 separate times. As our Supreme Court observed in *Watson*, "when numerous wounds are inflicted, the defendant has the opportunity to premeditate from one shot to the next. Even where the gun is capable of being fired rapidly, some amount of time, however brief, for thought and deliberation must elapse between each pull of the trigger." *Watson*, 338 N.C. at 179, 449 S.E.2d at 701 (internal citations and quotation marks omitted). The same logic applies to the infliction of multiple stab wounds.[2]

Therefore, we conclude that the trial court did not err in refusing to instruct the jury on the theory of voluntary manslaughter. Accordingly, Defendant's argument is overruled.

Conclusion

For the reasons stated above, Defendant received a fair trial free from error.

NO ERROR.

Judges STEPHENS and STROUD concur.

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2. The fact that Defendant took a knife from his workplace and brought it to Crystal's apartment further belies the notion that the element of malice was rebutted.

STATE v. CURTIS

[246 N.C. App. 107 (2016)]

STATE OF NORTH CAROLINA
v.
DONALD LEE CURTIS

No. COA15-279

Filed 1 March 2016

Kidnapping—second-degree—motion to dismiss—sufficiency of evidence—movement and restraint—robberies

The trial court did not err by denying defendant's motion to dismiss the second-degree kidnapping charges. While the movement and restraint of two of the four victims may have occurred during the course of all the robberies, the removal of these two victims from downstairs to upstairs was not integral to or inherent in the armed robberies of any of the four victims. Further, the removal of two of the victims upstairs did subject them to greater danger since the other intruders assaulted these victims with handguns after they were escorted upstairs.

Judge HUNTER, Jr., dissenting.

Appeal by defendant from judgments entered 12 March 2014 by Judge Ronald E. Spivey in Forsyth County Superior Court. Heard in the Court of Appeals 23 September 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Katherine A. Murphy, for the State.

Patterson Harkavy LLP, by Narendra K. Ghosh, for defendant-appellant.

McCULLOUGH, Judge.

Donald Lee Curtis ("defendant") appeals from judgments entered in accordance with a sentencing agreement reached after a jury found him guilty on one count of attempted robbery with a firearm, one count of possession of a firearm by a felon, one count of first-degree burglary of a dwelling house, two counts of robbery with a firearm, two counts of assault with a deadly weapon, and two counts of second-degree kidnapping. For the following reasons, we find no error.

I. Background

In the early morning hours of 30 April 2013, three armed black males, two with handguns and one with a shotgun, busted through the door of a residence at 2400 Harper Road in Clemmons where Megan Martin and Refeigo Pina lived. At the time of the break in, Christopher Cowles and Justin Collins were also at the residence. Cowles was with Pina in the downstairs living room where the intruders entered learning how to play Pina's guitar. Justin Collins and Martin were asleep in the upstairs bedroom.

As the intruders entered, they asked where Collins was, instructed each other to get the cell phones, and ordered Cowles and Pina to put their hands up. Cowles attempted to quickly dial 911 before he tossed his cell phone to the side of the couch that he and Pina were sitting on. The intruders did not get either Cowles' or Pina's cell phones. Cowles recognized the two intruders with handguns (the "other intruders") and inquired why they were doing what they were doing. The third intruder, whom Cowles did not know but whom Cowles was later able to identify as defendant with 100% certainty, then placed his shotgun in Cowles' face and threatened to shoot Cowles if Cowles was not quiet. Pina was held at gunpoint by one of the other intruders while the third intruder looked around for Collins. Upon repeated questioning concerning Collins' whereabouts, Cowles told the intruders that Collins was upstairs.

The intruders then ushered Cowles and Pina upstairs with guns to their backs. Cowles and Pina did not go upstairs voluntarily. Once upstairs, Cowles cut the lights on and tapped Collins on the foot to wake him up. As Collins was waking up, one of the other intruders pulled the covers back and struck Collins on the side of the head with a handgun. Martin was awakened by the commotion and was frantic. The intruders directed Cowles, Pina, Collins, and Martin into the corner of the bedroom and told them not to move. As they were moving to the corner, one of the other intruders struck Pina in the face with a handgun.

Defendant held the shotgun pointed towards Cowles, Pina, Collins, and Martin while the other intruders tore the bedroom apart. The other intruders took Collins' cellphone and wallet with approximately $2,000 in it from the nightstand, took cash from Martin's purse, and took Martin's iPhone from the dresser.

The other intruders then instructed defendant to stay with Cowles, Pina, Collins, and Martin as the other intruders went back downstairs. Cowles could hear lots of banging and smashing downstairs, like things were being destroyed. Defendant stayed at the top of the stairs with the

shotgun pointed at Cowles, Pina, Collins, and Martin to keep them from moving for several minutes before telling them not to move and backing down the stairs. The intruders then fled from the apartment, slashing tires on Cowles', Pina's, Collins', and Martin's vehicles upon their exit. In addition to the items taken from upstairs, the intruders took a PlayStation 3, Pina's guitar, and car keys from downstairs.

Besides Cowles' identification of defendant, both Collins and Martin were 100% certain that defendant was the intruder with a shotgun. Collins recognized defendant from time they spent incarcerated together.

Based on the events of 30 April 2013, defendant was arrested and later indicted by a Forsyth County Grand Jury on 23 September 2013 on three counts of robbery with a dangerous weapon, one count of attempted robbery with a dangerous weapon, two counts of second-degree kidnapping, one count of possession of a firearm by a felon, one count of first-degree burglary, and two counts of assault with a deadly weapon. Defendant's case came on for trial in Forsyth County Superior Court before the Honorable Judge Ronald E. Spivey on 10 March 2014.

At the conclusion of defendant's trial the jury returned verdicts finding defendant guilty on all charges except the one count of robbery with a dangerous weapon related to Pina. In accordance with a sentencing agreement reached between defendant and the State, the trial court consolidated defendant's nine convictions into three Class D felonies and sentenced defendant at the top of the presumptive range for each felony with a prior record level VI to three consecutive terms of 128 to 166 months imprisonment. The judgments were entered on 12 March 2014. Defendant gave notice of appeal in open court following sentencing.

II. Discussion

At the close of the State's evidence, defendant moved to dismiss all of the charges and the trial court denied defendant's motion. Defendant then renewed his motion after he decided not to put on any evidence in his own defense. The trial court again denied defendant's motion. Now on appeal, the only issue is whether the trial court erred in denying defendant's motion to dismiss the kidnapping charges.[1]

1. In the event we determined defendant's general motions to dismiss at trial did not preserve this issue for appeal, defendant additionally asserts an ineffective assistance of counsel argument. The State, however, specifically responds that "[it] does not dispute that [d]efendant preserved this issue for review." Upon review of the record, we think there is a question whether defendant's motions preserved this specific issue for appeal. Yet, given that the State concedes the issue is preserved and defendant has asserted an ineffective assistance of counsel argument in the alternative, we invoke Rule 2 of the North Carolina

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). " 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192-93, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

In North Carolina, any person who unlawfully confines, restrains, or removes from one place to another, any other person sixteen years old or older without the consent of such person is guilty of kidnapping if the confinement, restraint, or removal is for a purpose enumerated in the statute, including "[f]acilitating the commission of any felony or facilitating flight of any person following the commission of a felony[.]" N.C. Gen. Stat. § 14-39(a) (2015). "If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree . . . ." N.C. Gen. Stat. § 14-39(b).

Recognizing potential double jeopardy concerns in cases where the restraint necessary for kidnapping, that is "a restriction, by force, threat or fraud, without a confinement[,]" *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978), is essential to other charges, our Supreme Court explained as follows:

Rules of Appellate Procedure out of an abundance of caution and address the merits of the issue. *See State v. Marion*, __ N.C. App. __, __, 756 S.E.2d 61, 67-68, *disc. rev. denied*, 367 N.C. 520, 762 S.E.2d 444-45 (2014) (electing to review the defendant's sufficiency of the evidence argument pursuant to Rule 2 where the issue was not preserved for appeal but defendant also brought forward an ineffective assistance of counsel claim based on her trial counsel's failure to make a motion to dismiss).

> It is self-evident that certain felonies (e.g., forcible rape and armed robbery) cannot be committed without some restraint of the victim. We are of the opinion, and so hold, that [N.C. Gen. Stat. §] 14-39 was not intended by the Legislature to make a restraint, which is an inherent, inevitable feature of such other felony, also kidnapping so as to permit the conviction and punishment of the defendant for both crimes. To hold otherwise would violate the constitutional prohibition against double jeopardy. [To avoid the constitutional issue], we construe the word "restrain," as used in [N.C. Gen. Stat. §] 14-39, to connote a restraint separate and apart from that which is inherent in the commission of the other felony.
>
> On the other hand, it is well established that two or more criminal offenses may grow out of the same course of action, as where one offense is committed with the intent thereafter to commit the other and is actually followed by the commission of the other (e. g., a breaking and entering, with intent to commit larceny, which is followed by the actual commission of such larceny). In such a case, the perpetrator may be convicted of and punished for both crimes. Thus, there is no constitutional barrier to the conviction of a defendant for kidnapping, by restraining his victim, and also of another felony to facilitate which such restraint was committed, provided the restraint, which constitutes the kidnapping, is a separate, complete act, independent of and apart from the other felony.

Id. at 523-24, 243 S.E.2d at 351-52. Thus, in *Fulcher*, the Court held there was "no violation of the constitutional provision against double jeopardy in the conviction and punishment of the defendant for . . . two crimes against nature and also for . . . two crimes of kidnapping[,]" *id.* at 525, 243 S.E.2d at 352, because

> [t]he evidence for the State [was] clearly sufficient to support a finding by the jury that the defendant bound the hands of each of the two women, procuring their submission thereto by his threat to use a deadly weapon to inflict serious injury upon them, thus restraining each woman within the meaning of [N.C. Gen. Stat. §] 14-39, and that his purpose in so doing was to facilitate the commission of the felony of crime against nature.

Id. at 524, 243 S.E.2d at 352. The Court further explained that, based on the evidence, "the crime of kidnapping was complete, irrespective of whether the then contemplated crime against nature even occurred[,]" and "[t]he restraint of each of the women was separate and apart from, and not an inherent incident of, the commission upon her of the crime against nature, though closely related thereto in time." *Id.*

"In accordance with [the Court's] analysis of the term 'restraint' [in *Fulcher*], [the Court later] construe[d] the phrase 'removal from one place to another' [in N.C. Gen. Stat. § 14-39] to require a removal separate and apart from that which is an inherent, inevitable part of the commission of another felony." *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981). The analysis applies equally to "confinement" in N.C. Gen. Stat. § 14-39, which "connotes some form of imprisonment within a given area, such as a room, a house or a vehicle." *Fulcher*, 294 N.C. at 523, 243 S.E.2d at 351. More recently, the Court has explained that

> in determining whether a defendant's asportation of a victim during the commission of a separate felony offense constitutes kidnapping, [a trial court] must consider whether the asportation was an inherent part of the separate felony offense, that is, whether the movement was "a mere technical asportation." If the asportation is a separate act independent of the originally committed criminal act, a trial court must consider additional factors such as whether the asportation facilitated the defendant's ability to commit a felony offense, or whether the asportation exposed the victim to a greater degree of danger than that which is inherent in the concurrently committed felony offense.

State v. Ripley, 360 N.C. 333, 340, 626 S.E.2d 289, 293-94 (2006).

In the present case, defendant was convicted of kidnapping Cowles and Pina. Defendant now contends the trial court erred by not dismissing the kidnapping charges for insufficiency of the evidence because Cowles and Pina were moved and restrained only to the extent required for the armed robberies. Specifically, defendant asserts that "[a]ll restraint and movement of Cowles and Pina occurred during the course of the robberies and was integral to the robberies. There was no independent restraint or removal that could support [defendant's] convictions for kidnapping Cowles and Pina."

In addition to *Fulcher*, *supra*, defendant relies on a number of cases in which our appellate courts have overturned kidnapping convictions. The facts are important in each case.

In *Irwin*, the defendant was convicted of first degree felony murder, attempted armed robbery, and kidnapping after a failed robbery of a drugstore occupied by the owner and an employee. 304 N.C. at 95, 282 S.E.2d at 442. Pertinent to the present case, during the course of the attempted robbery, the defendant's accomplice "forced [the employee] at knifepoint to walk from her position near the . . . cash register to the back of the store in the general area of the prescription counter and safe." *Id.* at 103, 282 S.E.2d at 446. On appeal, defendant challenged the trial court's denial of his motion to dismiss the kidnapping charge and the Court reversed, noting that "[a]ll movement occurred in the main room of the store[]" and holding that "[the employee's] removal to the back of the store was an inherent and integral part of the attempted armed robbery[]" because "[t]o accomplish [the] defendant's objective of obtaining drugs it was necessary that either [the owner] or [the employee] go to the back of the store to the prescription counter and open the safe." *Id.* Thus, the removal of the employee "was a mere technical asportation and insufficient to support conviction for a separate kidnapping offense." *Id.*

In *State v. Ripley*, the defendant was convicted of seven counts of robbery with a firearm, three counts of attempted robbery with a firearm, and fifteen counts of second-degree kidnapping after a crime spree that included the armed robbery of a an Extended Stay American Motel and patrons. 172 N.C. App. 453, 453-54, 617 S.E.2d 106, 107 (2005), *aff'd.*, 360 N.C. 333, 626 S.E.2d 289 (2006). The evidence in *Ripley* pertinent to the present case was that the defendant and an accomplice waited in a vehicle outside the motel while three other accomplices entered the lobby of the motel and ordered the front desk clerk to empty the cash drawer. *Id.* at 454, 617 S.E.2d at 107-08. The robbers then asked about surveillance and the clerk led one of the robbers to the break room where the clerk handed over what she believed to be the surveillance tape. *Id.* at 454-55, 617 S.E.2d at 108. The robbers then ordered the clerk to return to the front desk and "act normal" while the robbers hid as a group of patrons arrived. *Id.* at 455, 617 S.E.2d at 108. When the clerk attempted to flee the desk area, the robbers leapt out, demanded money from the patrons, and ordered the patrons to the floor. *Id.* As this was occurring, a second group of patrons approached the lobby doors, noticed the robbery in progress, and attempted to walk away. *Id.* One of the robbers saw the second group of patrons, forced them to enter the lobby, and robbed them. *Id.* On appeal to this Court, the defendant argued the trial court erred in denying his motions to dismiss the kidnapping charges related to the first group of patrons, the second group of patrons, and the motel clerk on the bases that the kidnappings were not separate

from the robberies and the charges violated double jeopardy. *Id.* at 457-61, 617 S.E.2d at 109-11. Upon review, this Court recognized that " 'the key question in a double jeopardy analysis is whether the kidnapping charge is supported by evidence from which a jury could reasonably find that the necessary restraint for kidnapping exposed the victim to greater danger than that inherent in the underlying felony itself.' " *Id.* at 457, 617 S.E.2d at 109 (quoting *State v. Muhammad*, 146 N.C. App. 292, 295, 552 S.E.2d 236, 237 (2001)) (brackets omitted). This Court then reversed the defendant's kidnapping convictions, holding that the first group of patrons was not exposed to any danger greater than that inherent in the robberies for which the defendant was convicted, *id.* at 458, 617 S.E.2d at 109-10, the second group of patrons "had already been exposed to the danger inherent in the robbery as they approached the [m]otel door[]" and "their movement into the [m]otel lobby [was nothing] more than a mere technical asportation also inherent in the armed robbery[,]" *id.* at 459, 617 S.E.2d at 110 (internal quotation marks omitted), and the movement of the clerk to the break room did not expose the clerk "to a danger greater than and independent from that inherent in the robbery for which [the] defendant was already convicted." *Id.* at 460-61, 617 S.E.2d at 111.

On appeal to our Supreme Court from a dissent in this Court's *Ripley* opinion on the issue of whether the forced movement of the second group of patrons into the motel lobby could sustain a separate kidnapping conviction, our Supreme Court affirmed this Court's decision, concluding "the asportation of the [second group of patrons] from one side of the motel lobby door to the other was not legally sufficient to justify [the] defendant's convictions of second-degree kidnapping[]" because "[t]he moment [the] defendant's accomplice drew his firearm, the robbery with a dangerous weapon had begun. The subsequent asportation of the victims was 'a mere technical asportation' that was an inherent part of the robbery defendant and his accomplices were engaged in." *Ripley*, 360 N.C. at 340, 626 S.E.2d at 294.

In *State v. Cartwright*, the defendant was convicted of first-degree kidnapping, armed robbery, first-degree rape, and other offenses based on evidence tending to show that when the victim opened her house door, the defendant grabbed the victim's arm and forced the victim back into her kitchen, pulled a knife out of his pocket, demanded money, put the knife back in his pocket and attempted to choke the victim with a towel, struggled with the victim from the kitchen, through a hallway, and into the den, knocked the victim to the floor, attempted to smother the victim with a pillow, raped the victim, demanded money again, followed

the victim down a hallway to the victim's bedroom where the victim gave the defendant a dollar, and then fled the victim's house. 177 N.C. App. 531, 532-33, 629 S.E.2d 318, 320-21, *disc. rev. denied*, 360 N.C. 578, 635 S.E.2d 902 (2006). On appeal, the defendant challenged the trial court's denial of his motion to dismiss the kidnapping charge for insufficient evidence and raised a double jeopardy argument. *Id.* at 534, 629 S.E.2d at 321. Addressing the trial court's denial of the defendant's motion to dismiss, this Court vacated the kidnapping conviction, explaining as follows:

> With regards to armed robbery . . .[,] [t]he victim's movement down the hallway is a mere asportation because the armed robbery began when defendant showed the knife to the victim in the kitchen and demanded money, and [the] defendant's movement between the kitchen, den, and bedroom did not expose the victim to a greater degree of danger. . . .
>
> With regards to rape, [the] defendant began and concluded the rape in the den. Because the crime of rape occurred wholly in the den, we find that there was insufficient evidence of confinement, restraint, or removal.

Id. at 537, 629 S.E.2d at 323. Although this Court explicitly stated it would not address the defendant's double jeopardy argument because it vacated the kidnapping charge due to insufficiency of the evidence, *id.*, it is clear from the Court's explanation that the kidnapping conviction was vacated because the only confinement, restraint, or removal was that inherent in the armed robbery and rape, for which the defendant was convicted.

In *State v. Payton*, the defendant was convicted of first-degree burglary, two counts of robbery with a dangerous weapon, and two counts of second-degree kidnapping. 198 N.C. App. 320, 320-21, 679 S.E.2d 502, 502 (2009). The evidence was that during a burglary the defendant and two accomplices encountered the home owner and her daughter in the bathroom area and, at gun point, "instructed the women to move into the bathroom, lie on the floor, and not look at them." *Id.* at 321, 679 S.E.2d at 503. The burglar with a gun then remained outside the bathroom while the other two burglars retrieved the homeowner's purse. The burglars then ordered the victims not to look at them, closed the bathroom door, and removed a television from the bedroom as they left the house. *Id.* On appeal, this Court held that moving the victims from the bathroom area, "which was described as a foyer leading from the

bathroom to the bedroom," *id.*, into the bathroom "was an inherent part of the robbery and did not expose the victims to a greater danger than the robbery itself." *Id.* at 328, 679 S.E.2d at 507. The Court described the movement of the women as "a 'technical asportation,' such as seen in *Irwin*, *Ripley*, and *Cartwright*." *Id.*

In *State v. Featherson*, the defendant was convicted of robbery with a dangerous weapon, second-degree kidnapping, and conspiracy to commit armed robbery after she helped her boyfriend and a mutual friend rob the Bojangles restaurant where the defendant worked. 145 N.C. App. 134, 135-36, 548 S.E.2d 828, 829-30 (2001). During the robbery, the defendant's boyfriend forced the defendant and another employee to the floor and loosely bound them together with duct tape while the mutual friend forced the manager to the office and ordered her to open the safe. *Id.* at 135, 548 S.E.2d at 830. Although not specifically raised or argued on appeal, this Court addressed the sufficiency of the evidence supporting the defendant's conviction for kidnapping the employee who was bound to the defendant in the course of the robbery and held the trial court erred in denying the defendant's motion to dismiss the kidnapping charge. *Id.* at 139, 548 S.E.2d at 832. This Court reasoned that, where the employee was already in the same room where she was bound to the defendant and was bound to the defendant in such a manner as to allow them to escape quickly, "[the employee] was exposed to no greater danger than that inherent in the armed robbery itself, nor was she subjected to the kind of danger and abuse the kidnapping statute was designed to prevent." *Id.* at 140, 548 S.E.2d at 832 (internal quotation marks and brackets omitted). Thus, "the restraint and movement of [the employee] was an inherent and integral part of the armed robbery[]" and "not sufficient to sustain a conviction for second-degree kidnapping." *Id.* at 139-40, 548 S.E.2d at 832.

Relying first on *Cartwright*, defendant contends the robberies in the present case began as soon as he and his accomplices entered the residence and ordered Cowles and Pina to turn over their cell phones. Consequently, defendant claims any movement or restraint thereafter occurred during the course of the robberies. Defendant then relies on *Ripley* and *Irwin* to argue that moving victims to the location of other victims or to the area where the stolen property was located is integral to the robbery. Lastly, defendant relies on *Featherson* and *Payton* to support his contention that the restraint of Cowles and Pina in the corner of the upstairs bedroom while the other intruders searched the residence was not independent of the robbery.

While the movement and restraint of Cowles and Pina may have occurred during the course of all the robberies, we are not convinced that the removal of Cowles and Pina from downstairs to upstairs was integral to or inherent in the armed robberies of Cowles and Pina, or the armed robberies of Collins and Martin.

First, the evidence tends to show that the robberies, or attempted robberies, of Cowles and Pina took place entirely downstairs when the robbers demanded Cowles' and Pina's cell phones, to no avail. There is no evidence that any other items were demanded from Cowles or Pina at any other time and Cowles testified that nothing was taken from his person. Thus, it is difficult to accept defendant's argument that the movement of Cowles and Pina was integral to the attempted robberies of Cowles and Pina. We emphasize attempt because defendant was convicted of attempted robbery with a firearm of Cowles; defendant was acquitted of robbery with a firearm of Pina. In fact, the evidence in this case is clear that defendant and the other intruders entered the residence in search of Collins. In the light most favorable to the State, it appears the removal of Cowles and Pina from downstairs to the upstairs was neither integral in the robberies of them, nor the robberies of Collins and Martin.

Second, we find the removal of Cowles and Pina from downstairs to upstairs by defendant and the other intruders to be more significant than the movement of victims from one side of a motel lobby door to the other in *Ripley* or from a bathroom foyer into the adjoining bathroom in *Payton*. Therefore, we hold the present case is distinguishable from those cases. We further note that in *Ripley*, the second group of patrons were robbed once they were forced into the motel lobby, *Ripley*, 172 N.C. App. at 455, 617 S.E.2d at 108, whereas in this case, nothing was taken from Cowles or Pina once they were moved upstairs. The present case is more similar to *State v. Allred*, 131 N.C. App. 11, 505 S.E.2d 153 (1998), and *State v. Davidson*, 77 N.C. App. 540, 335 S.E.2d 518 (1985). In *Allred*, the defendant was convicted on several kidnapping charges stemming from the armed robbery of a residence. 131 N.C. App. at 15, 505 S.E.2d at 156. On appeal, this Court addressed the kidnapping of the victims separately. Pertinent to this case, the Court held that the forced movement of one victim from his bedroom to the living room and the subsequent restraint of that victim on the couch was sufficient to uphold a kidnapping conviction. *Id.* at 21, 505 S.E.2d at 159. This Court reasoned that because nothing was taken from the victim and there was no evidence of an attempt to rob the victim, the removal of the victim "was not an integral part of any robbery committed against him, but a

separate course of conduct designed to prevent [the victim] from hindering [the] defendant and his accomplice from perpetrating the robberies against the other occupants." *Id.* In so holding in *Allred*, this Court cited its decision in *Davidson*, in which this Court upheld kidnapping convictions where, during the robbery of a clothing store, the defendant and accomplices forced a store owner, an employee, and a customer at gunpoint to go from the front of the store to a dressing room in the rear of the store, bound the victims, and robbed the victims of cash and jewelry before taking money from the cash register and merchandise from tables, and fleeing. *Davidson*, 77 N.C. App. at 541, 335 S.E.2d at 519. In holding the trial court did not err in denying motions to dismiss the kidnapping charges, this Court reasoned that the removal of the victims to the dressing room was not an inherent and integral part of the robbery because none of the property was kept in the dressing room. *Id.* at 543, 335 S.E.2d at 520. This Court instead viewed the removal of the victims as a "separate course of conduct designed to remove the victims from the view of [a] passerby who might have hindered the commission of the crime." *Id.*

The reasoning in *Allred* and *Davidson* applies equally in the present case. Because nothing further was sought, nor taken, from Cowles and Pina after they were ordered to give up their cell phones, it appears the only reason to remove Cowles and Pina to the upstairs was to prevent them from hindering the subsequent robberies of Collins and Martin.

Third, we are not persuaded that *Irwin* and *Ripley* apply in this case. Defendant relies on *Irwin* and *Ripley* for the propositions that moving victims to an area where the property taken is located or to an area where other victims are located are inherent and integral parts of the robbery. Defendant's takeaways from those cases are imprecise and oversimplified. In *Irwin*, the Court made clear that the removal of the drugstore employee from the cash register area to the prescription counter in the back of the drugstore was an inherent and integral part of the attempted armed robbery because the defendant needed the employee to open a safe in order to complete the defendant's objective of obtaining drugs. 304 N.C. at 103, 282 S.E.2d at 446. In this case, there is no evidence that it was necessary to move Cowles and Pina upstairs to complete the robbery of Collins and Martin. In affirming this Court in *Ripley*, our Supreme Court held the movement of the second group of patrons from one side of the motel lobby door to the other was not legally sufficient to support separate kidnapping convictions because the robbery began the moment an accomplice drew a firearm and the movement of the second group of patrons "was 'a mere technical asportation' that

was an inherent part of the robbery defendant and his accomplices were engaged in." 360 N.C. at 340, 626 S.E.2d at 294. Yet, we find it significant that the second group of patrons in *Ripley* was robbed after they were moved into the lobby. There was no purpose in the present case to move Cowles and Pina upstairs besides to prevent them from hindering the robberies of Collins and Martin.

Lastly, we note that the removal of Cowles and Pina upstairs did subject them to greater danger. Although our Court has acknowledged that the display of a firearm or threatened use of a firearm does not subject the victims to greater danger than that inherent in an armed robbery, *see Ripley*, 172 N.C. App. at 457-58, 617 S.E.2d at 109, the evidence here is that the other intruders assaulted the victims with handguns after Cowles and Pina were escorted upstairs. Thus, in the light most favorable to the State, Cowles and Pina were subjected to greater danger as a result of their removal to the upstairs of the residence.

III. Conclusion

In the light most favorable to the State, the evidence in this case is sufficient to sustain the separate second-degree kidnapping convictions. Thus, the trial court did not err in denying defendant's motions to dismiss.

NO ERROR.

Judge STEPHENS concurs.

Judge HUNTER, Jr., dissents.

HUNTER, JR., Robert N., Judge, Dissenting.

Defendant was indicted for two counts of second degree kidnapping. The first indictment charges him with kidnapping Refegio Pina in connection with the attempted armed robbery of Christopher Cowles's cell phone. The second indictment charges Defendant with kidnapping Christopher Cowles, Count I, "by using, displaying, or threatening the use or display of a firearm and the defendant did actually possess the firearm about the defendant's person." Count II is an assault with a deadly weapon charge alleging Defendant struck Collins in the head with a handgun. Count III is an assault with a deadly weapon charge alleging Defendant struck Pina in the head with a handgun. While the attempted armed robbery against Cowles took place in the downstairs of the home, the assaults against Collins and Pina took place upstairs. In

an indictment charging kidnapping, the State does not have to "set forth . . . the specific felony that the kidnapping facilitated." *State v. McRae*, 231 N.C. App. 602, 752 S.E.2d 731 (2014) (citation omitted). Nonetheless, the armed robbery of Cowles, and the assaults on Collins and Pina are contained in the kidnapping indictments and we should examine their factual bases as predicates for the kidnapping charges.

As the majority opinion points out, all of the criminal acts took place within Martin's home. The majority makes a distinction that the asportation of Pina and Cowles took place when they were moved from the downstairs living room to the upstairs bedroom. The majority contends these asportations were separate acts from the attempted robbery against Cowles, which occurred downstairs, and the assault on Collins, which occurred upstairs. In my view, these individual crimes occurred throughout the home and were all part of an overall plan to rob Collins inside the home. I dissent because our precedent holds that all criminal acts that are part of a robbery transaction cannot be so carefully parsed as to create separate kidnapping crimes. *See State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981); *State v. Ripley*, 172 N.C. App. 453, 617 S.E.2d 106 (2005), *affirmed*, 360 N.C. 333, 626 S.E.2d 289 (2006). To adopt the majority's view would make the technical asportation defense under the double jeopardy clause incapable of consistent application and render it judicially unmanageable.

I agree that the majority has cited the appropriate test to be applied from *Ripley*, 360 N.C. at 340, 626 S.E.2d at 293–94. It is clear the restraint of Pina and Cowles "facilitated" Defendant's ability to rob Collins. Defendant transferred Pina and Cowles to prevent them from calling for help during the robbery. It is difficult to understand how putting them upstairs while the robbery was in progress placed them in a heightened danger. If one were to apply the rule advanced by the majority here, it is clear Defendant was indicted for kidnapping Cowles in connection with assaulting Collins upstairs by striking him in the head with a handgun. The analysis, as I understand the majority opinion, would entitle Defendant to a have at least one of the kidnapping judgments arrested. I think aptly the Supreme Court precedent would require both kidnapping charges be arrested and we should remand the case to the trial court for a new sentencing hearing.

STATE v. GIVENS

[246 N.C. App. 121 (2016)]

STATE OF NORTH CAROLINA
v.
ARTHUR LEE GIVENS

No. COA15-710

Filed 1 March 2016

Constitutional Law—effective assistance of counsel—evidence promised not produced

Defendant received effective assistance of counsel in a first-degree murder prosecution where he argued that evidence promised in the opening was not produced. Defendant knowingly and voluntarily consented to allow defense counsel to make certain concessions to the jury, and, despite defense counsel's argument that his representation of defendant constituted ineffective assistance of counsel, the record does not support the argument that defense counsel's performance so undermined the adversarial process that the trial cannot be relied on as having produced a just result.

Appeal by defendant from order entered 11 November 2014 by Judge Eric L. Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 January 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General I. Faison Hicks, for the State.

Michael E. Casterline, for defendant-appellant.

BRYANT, Judge.

Where defendant has not met his burden to show that defense counsel was deficient by not fulfilling a promise made to the jury in his opening statement, defendant was not prejudiced and is not entitled to a new trial.

Arthur Lee Givens, defendant, and Donald Everette Gist, the victim, became acquainted in the fall of 2014 while they both stayed at Schameka Earl's home for a few weeks. At first, Gist got along well with both Earl and defendant. After a few weeks, however, both Earl and defendant began having issues with Gist. Defendant, who testified at trial, said Gist began threatening him, and other people in the house had to intervene to keep peace between them, as he and Gist "had each other's throat."

On one occasion, defendant saw Gist carrying a handgun tucked into his pants as he walked around Earl's house. A few days after Thanksgiving, on or about 4 December 2013, after suspecting that Gist had a gun in her house, Earl testified that she told Gist to move out.

On 6 December 2013, the day of Gist's murder, Earl, defendant, and Tonya McCaster were at Earl's house. McCaster testified that defendant received a telephone call and, after he hung up, defendant said he "was gonna murder him." Defendant left and returned less than ten minutes later. Upon his return to Earl's house, he said, "I did it." McCaster testified that she heard sirens and the sound of an ambulance and police cars. Defendant then left Earl's house quickly.

Also on 6 December 2013, Jason Dobie, who was staying in a home near Earl's house, left to walk to the Queens Mini Mart. As he was walking there, he heard several gunshots. After he heard the gunshots, defendant ran past him in the direction of Earl's house. As defendant passed Dobie, Dobie heard defendant say "he shouldn't have crossed me." Dobie arrived at the Queens Mini Mart to see Gist lying dead on the pavement.

The Queens Mini Mart operated a surveillance camera at the time of the shooting. This camera's footage depicted the scene before and during the shooting. The video footage showed, *inter alia*, the following: (1) defendant at the Mini Mart; (2) that Gist had no weapon in his hand; (3) that Gist did not walk towards or otherwise approach defendant; (4) before Gist was shot, he started walking away from defendant; (5) defendant pulled out a gun as Gist continued to walk away from defendant; (6) defendant shot Gist a total of five times, killing him; and (7) even after defendant shot Gist and Gist was on the ground, defendant continued to shoot him. Defendant testified that he believed Gist had a gun, based on a bulge he saw on Gist's person. Defendant also testified that he "felt eminent [sic] danger at the time." Four days later, defendant was arrested.

Forensic evidence revealed that Gist had gunshot wounds to the head, torso, back, and hands, and that the cause of death was from gunshot wounds to the head and chest, each one of which was independently lethal. The police found no weapons on Gist after his death, but the medical examiner found a crack pipe in Gist's clothing.

Defendant was indicted on charges of first-degree murder and possession of a firearm by a felon on 16 December 2013. Defendant was tried on 17–21 November 2014 in the Criminal Superior Court of Mecklenburg County, before the Honorable Eric L. Levinson.

Before trial, defendant's attorney filed notice of intent to assert self-defense and also requested a *Harbison* hearing. During the *Harbison* hearing, defendant acknowledged that he had reviewed the discovery in his case; he had a basic understanding of the concept of self-defense; it was his decision as to whether or not his attorney could ask the jury to convict him of voluntary manslaughter; and he understood he could assert self-defense without making any concessions. Defendant specifically acknowledged that he agreed with his attorney's plan to concede to the jury that defendant had possessed a gun and that he had killed Gist by shooting him. The trial court concluded that defendant made these decisions knowingly, voluntarily, and intelligently. Thereafter, defendant pled guilty to the charge of possession of a firearm by a felon, with no plea agreement or other representation from the State. The trial court continued judgment upon sentencing.

At trial, during defense counsel's opening statement, he told the jurors that the evidence would show that defendant's conduct had been justified:

> [Defendant] did kill Mr. Gist. There is no question about that. . . . The question is was the conduct justified. When you hear all of the evidence you're going to find that his conduct was justified based on everything that had happened in the weeks before and what finally led up to this event. . . . I believe the evidence that you will hear and in the end everything will say he was justified.

At the charge conference following the presentation of all the evidence, defense counsel requested an instruction on voluntary manslaughter, saying that imperfect self-defense supported the instruction. The trial court denied that request. Defense counsel also requested an instruction on second-degree murder, which the trial court granted. After the trial court explained that it would instruct the jury only on first-degree and second-degree murder, defense counsel made a motion for a mistrial based on his own ineffective assistance of counsel. The motion for a mistrial was denied.

Defendant was found guilty of first-degree murder. The trial court consolidated the conviction for possession of a firearm with the first-degree murder conviction and sentenced defendant to life in prison without parole. Defendant appeals.

On appeal, defendant argues that trial counsel's failure to produce promised evidence amounts to ineffective assistance of counsel. Specifically, defendant contends that because defense counsel specifically promised that the evidence would show the jury that defendant's conduct was justified, but none of the evidence presented suggested that defendant's shooting the victim was justified or done in self-defense, defense counsel's failure to deliver on his promise to the jury amounted to ineffective assistance of counsel. We disagree.

"[I]neffective assistance of counsel claims 'brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing.' " *State v. Thompson*, 359 N.C. 77, 122–23, 604 S.E.2d 850, 881 (2004) (citation omitted) (quoting *State v. Fair*, 354 N.C. 131, 166, 577 S.E.2d 500, 524 (2001)).

> To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's performance prejudiced his defense. Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (internal citations and quotation marks omitted). Further, when a court undertakes to engage in this analysis,

> every effort [must] be made to eliminate the distorting effects of hindsight . . . . Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland v. Washington, 466 U.S. 668, 689, 80 L. Ed. 2d 674, 694–95 (1984) (citation omitted).

Defendant argues that if defense counsel had not relied on a strategy of self-defense, defendant would not, at his attorney's suggestion, have conceded essential elements of the crime. Defendant further contends that defense counsel should have been aware that the evidence was legally insufficient to support any type of defensive force instruction and that defense counsel's deficient performance was exacerbated by the promise made to the jury that there would be evidence of justification for the shooting.

In support of his argument, defendant relies on two cases, *State v. Moorman*, 320 N.C. 387, 358 S.E2d 502 (1987), and *Anderson v. Butler*, 858 F.2d 16 (1st Cir. 1988), contending that each stands for the proposition that a promise made by defense counsel in an opening statement which counsel does not ultimately fulfill amounts to a *per se* instance of ineffective assistance of counsel, requiring a new trial. However, these cases are either highly distinguishable (*Moorman*), or not controlling authority (*Anderson*).

In *Moorman*, the N.C. Supreme Court noted that defense counsel's "promised defense severely undercut the credibility of the actual evidence offered at trial . . . ." 320 N.C. at 401, 358 S.E.2d at 511. Including his failing to deliver on a promised defense, the defendant's trial counsel in *Moorman* committed, *inter alia*, a wide array of incredibly egregious acts of misconduct: (1) he told the jury in his opening statement that he would produce "one critical piece of evidence" which would show it was physically impossible for the defendant to have raped the victim, even though he had not adequately investigated the facts of the case; (2) he did not locate or interview any witnesses before the trial started; (3) he never prepared his own client for trial, and he never discussed his testimony or the questions he could expect to be asked on direct or cross-examination; (4) he took a wide combination of powerful drugs during the trial, which caused his speech to be slurred and caused him to fall asleep at trial (including during cross-examination of the defendant); and (5) he labored under a conflict of interest in that he had a "public cause" of establishing a racially motivated prosecution. *Id.* at 393–97, 358 S.E.2d at 506–08.

Unlike the defendant's appeal in *Moorman*, in the instant case defendant's entire appeal, based on ineffective of assistance of counsel, rests upon the assumption that defense counsel misled defendant into conceding, admitting, and stipulating to factual matters that were hotly disputed and subject to meaningful controversy. This was not the case. Here, defendant conceded and stipulated only to facts as to which there

could be no dispute, given what the Queens Mini Mart video surveillance footage undeniably showed.

First, the trial court conducted a comprehensive *Harbison* inquiry. A "*Harbison* inquiry" regards the principle enunciated in *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), in which the N.C. Supreme Court held that "a counsel's admission of his client's guilt, without the client's knowing consent and despite the client's plea of not guilty, constitutes ineffective assistance of counsel." *Id.* at 179, 337 S.E.2d 506–07. Accordingly, "[b]ecause of the gravity of the consequences" of pleading guilty, an "inquiry" with defendant is conducted, which involves a thorough questioning of the defendant by the trial court in order to ensure that his "decision to plead guilty . . . [is] made knowingly and voluntarily . . . after full appraisal of the consequences." *Id.* at 180, 337 S.E.2d at 507 (citations omitted) ("[T]he gravity of the consequences demands that the decision to plead guilty remain in the defendant's hands. When counsel admits his client's guilt without first obtaining the client's consent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away."); *see State v. Holder*, 218 N.C. App. 422, 425–28, 721 S.E.2d 365, 367–69 (2012) (holding that defense counsel's concession during his closing argument of defendant's guilt of a lesser-included offense was not *per se* ineffective assistance of counsel where defendant consented to his attorney's concession); *State v. Maready*, 205 N.C. App. 1, 12–13, 695 S.E.2d 771, 779–80 (2010) (reviewing a trial court's *Harbison* hearing to determine whether defendant explicitly consented to defense counsel's concessions made during closing argument); *State v. Johnson*, 161 N.C. App. 68, 77–78, 587 S.E.2d 445, 451 (2003) (concluding "that the trial court's [*Harbison*] inquiry was adequate to establish that defendant had previously consented to his counsel's concession[s]").

Here, the trial court's *Harbison* inquiry with defendant revealed that defendant "knowingly and voluntarily" consented to allow defense counsel to make certain concessions to the jury—specifically, that he had possessed a gun and killed the victim by shooting him—and gave permission for his attorney to argue for a voluntary manslaughter conviction:

> THE COURT: . . . [Y]ou understand that it is your independent decision on whether or not to make certain concessions or to, you know, allow [defense counsel] to argue certain things?
>
> Do you understand that?
>
> THE DEFENDANT: Yes, sir.

THE COURT: And has [defense counsel], you know, in the last weeks or months shared with you the [d]iscovery? For example, the materials that the government has provided in terms of what their case or information looks like?

[DEFENDANT]: Yes, sir.

THE COURT: And do you have some basic understanding about what self-defense means?

[DEFENDANT]: Yes, sir.

THE COURT: And do you understand that no matter what [defense counsel] has said to you or other lawyers or others have said to you that again, it is your independent decision on whether or not to allow your counsel to basically tell the jury that they should convict you of voluntary manslaughter?

Do you understand that?

[DEFENDANT]: Yes, sir.

THE COURT: And that you could still assert, assuming that the Court at some point allows the argument to be made to the jury, but do you understand that it is not required as a matter of law that you concede anything in order to allow you to argue self-defense?

Stated differently, you know, the Court might still allow you to ask the jury to find self-defense here even if you didn't make any concessions or allow [defense counsel] to argue any of these things; do you understand that?

[DEFENDANT]: Yes, sir.

THE COURT: But did you have any questions for me about this subject?

[DEFENDANT]: No, sir. My attorney went over everything.

THE COURT: And are you in agreement that your lawyers should be permitted to make concessions to the jury, being that you possessed a firearm, that you shot numerous times resulting in – shot the decedent resulting in his death?

And furthermore your agreement to give them flexibility to argue that they should convict you of voluntary

> manslaughter as we go through this trial, is that your desire, your wish?
>
> [DEFENDANT]: Yes, sir.

Unlike the defense counsel in *Moorman*, here, it was further revealed during the *Harbison* inquiry that defense counsel (1) met with defendant more than fifteen times during the week prior to trial; (2) went over all of defendant's anticipated testimony and all of the State's discovery and evidence, including the Queens Mini Mart video footage; and (3) went over all the elements of the charges of murder and manslaughter under North Carolina law and the legal doctrines of excessive force and perfect versus imperfect self-defense. We also note that counsel in the instant case made several motions before and during trial on behalf of defendant, made several objections to questions posed to witnesses by the State, and vigorously and extensively cross-examined the State's witnesses. Further, there is no evidence defense counsel had any conflict of interest, was under the influence of drugs, or fell asleep during trial.

Ultimately, *Moorman* is distinguishable because, here, defense counsel's performance was not deficient, as his efforts on behalf of defendant illustrate, and defendant cannot show prejudice, as the State presented overwhelming evidence at trial to prove beyond a reasonable doubt that defendant did commit first-degree murder. Such evidence was completely independent of any concession, admission, or stipulation by defendant or his attorney.

In *Anderson*, a First Circuit case on which defendant relies, defense counsel made a "dramatic" promise to the jury in his opening statement related to extremely material and exculpatory testimony. 858 F.2d at 17. The evidence was available to defense counsel, and he could have presented it to the jury, as promised, but he chose not to do so. He had told the jury he would call a psychiatrist and a psychologist but, without calling any doctors, rested his case based on lay witness testimony only. *Id.* The First Circuit held that "to promise . . . such powerful evidence, and then not produce it, could not be disregarded as harmless. We find it prejudicial as a matter of law." *Id.* at 19.

Not only is *Anderson* not controlling authority, but also, to the extent *Anderson* stands for the proposition that defense counsel's failure to fulfill a promise made in an opening statement constitutes an act of *per se* ineffective assistance of counsel mandating a new trial, the United States Court of Appeals for the Fourth Circuit eschewed *Anderson* and the concept of such a bright-line rule:

> [In] *United States v. McGill*, 11 F.3d 223 (1st Cir. 1993), the First Circuit appeared to read narrowly its *Anderson* decision. The court said: "Although a failure to produce a promised witness *may under some circumstances* be deemed ineffective assistance, . . . the determination of inefficacy is *necessarily fact based*. . . ."
>
> We agree with the reasoning of the more recent First Circuit decision and with Judge Breyer's dissenting opinion in *Anderson*, both of which adhere to *Strickland*'s express warning that:
>
> > No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.
>
> . . . In our view, assuming counsel does not know at the time of the opening statement that he will not produce the promised evidence, an informed change of strategy in the midst of trial is "virtually unchallengeable[.]" Were we to adopt [the defendant's] position, we would effectively be instructing defense counsel to continue to pursue a trial strategy even after they conclude that the original strategy was mistaken or that the client may be better served by a different strategy.

Turner v. Williams, 35 F.3d 872, 903–04 (4th Cir. 1994) (internal citations omitted) (quoting *Strickland*, 466 U.S. at 688–89, 80 L. Ed. 2d at 694), *rev'd on other grounds in O'Dell v. Netherland*, 95 F.3d 1214, 1222 (4th Cir. 1996).

This Court and the North Carolina Supreme Court have both likewise rejected a bright-line rule in favor of a fact-specific approach that evaluates the prejudice to the defendant. *See*, *e.g.*, *State v. Mason*, 337 N.C. 167, 176–77, 177 n.1 (1994) (quoting *Moorman*, 320 N.C. at 401–02, 358 S.E.2d at 511) (finding opening remarks made by defense counsel did not constitute a "promised defense" in the context determined to be at issue in *Moorman*, and noting that in *Moorman*, the N.C. Supreme Court

based its holding on several facts, including defense counsel's "wide-ranging opening assertions," but also his use of drugs and "his drowsiness, lethargy, and inattentiveness during portions of the trial"); *State v. Ortez*, 178 N.C. App. 236, 249–50, 631 S.E.2d 188, 198 (2006) (distinguishing *Moorman* and finding that defense counsel kept its "promise" to the jury where evidence introduced at trial corroborated defendant's opening statement); *see also State v. Floyd*, No. COA12-1123, 2013 WL 2163808, *8 (N.C. Ct. App. May 21, 2013) (unpublished) (distinguishing *Moorman* where defense counsel's failure to recall a witness, standing alone, did not rise to the level of ineffective assistance of counsel).

However, one particularly unique incident occurred in this case, which requires consideration. At the charge conference, defense counsel argued that imperfect self-defense supported an instruction on voluntary manslaughter. He also asked for an instruction on second-degree murder. The trial court denied an instruction on self-defense, but stated it would instruct the jury on first-degree and second-degree murder. Defendant's trial attorney then made a motion for a mistrial based on his own ineffective assistance of counsel:

> At this time I think for the record I'll make a motion for a mistrial based on the ineffective assistance of counsel. We made a concession at the beginning in opening arguments, jury selection, our questioning all based in anticipation of getting the voluntary manslaughter [jury instruction]. My client relied upon my representations there and conceivably to his detriment at this point. And would ask the Court to consider a mistrial at this time.

The trial court denied the motion, stating that "certainly there was a reasonable effort and argument [by defense counsel] to try to make out a showing for self-defense."

The U.S. Supreme Court has laid out a test, which North Carolina has adopted, *see State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985), which places a very high burden on defendants to establish ineffective assistance of counsel: "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct *so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result*." *Strickland*, 466 U.S. at 686, 80 L.Ed.2d at 692–93 (emphasis added).

Despite defense counsel's own argument to the court that his representation of defendant constituted ineffective assistance of counsel,

the record does not support the argument that defense counsel's performance "so undermined the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* To the contrary, the record is replete with motions defense counsel made on behalf of defendant, objections made at trial, and thorough cross-examination of the State's witnesses. Further, defendant testified to his contentious relationship with the victim, and that he felt threatened by the victim who possessed, at varying times, a knife and a gun. Defendant testified that he saw what he thought was a gun on the victim, that he feared for his life, and that is why he shot the victim and kept shooting.

This testimony could be considered as evidence of justification, such that defendant's challenge that counsel failed to fulfill a promise made in his opening statement is without merit. Defense counsel promised and delivered evidence, but it was for the jury to determine whether to believe that evidence. Defense counsel, through the adversarial process, not only put forth a defense for defendant, but also forced the State to prove its case beyond a reasonable doubt and challenged the State at every reasonable opportunity. In moving for mistrial based on his own alleged ineffective assistance of counsel, defense counsel contrived to demonstrate his zealous advocacy on behalf of his client by choosing to effectively fall on his own sword.

Defendant has not shown that defense counsel was deficient and that his trial was prejudiced as a result. Accordingly, defendant's argument that he received ineffective assistance of counsel and is entitled to a new trial is overruled.

NO ERROR.

Judges DILLON and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
NICHOLAS JOHNSON

No. COA15-903

Filed 1 March 2016

Probation and Parole—revocation—willfully absconding

The Court of Appeals exercised its discretion to allow defendant's writ of certiorari and determined that the trial court did not err by revoking defendant's probation and activating his suspended sentences. Defendant not only moved from his place of residence, without notifying or obtaining prior permission from his probation officer, but willfully avoided supervision for multiple months and failed to make his whereabouts known to his probation officer at any time thereafter. Defendant had violated the conditions of his probation by willfully absconding.

Appeal by defendant from judgment entered 20 February 2015 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 10 February 2016.

Attorney General Roy Cooper, by Assistant Attorneys General W. Thomas Royer and Sherri Horner Lawrence, for the State.

Irons & Irons, P.A., by Ben G. Irons, II, for defendant-appellant.

TYSON, Judge.

Nicholas Johnson ("Defendant") appeals by writ of certiorari from judgment entered upon revocation of probation. We affirm.

I. Factual and Procedural Background

On 29 July 2013, Defendant pled guilty to one count of felony possession/distribution of a precursor chemical and three counts of felony possession/distribution of a methamphetamine precursor in McDowell County Superior Court. The trial court entered judgment in accordance with the plea agreement, and imposed four consecutive active sentences of 19 to 32 months imprisonment. The sentences were suspended, and Defendant was placed on supervised probation for 36 months.

Defendant's probation was subsequently transferred to Nash County. On 7 May 2014, Defendant's probation officer, Howard Clark ("Officer

Clark"), filed three probation violation reports against Defendant. The violation reports alleged Defendant had willfully violated the conditions of his probation by: (1) moving from his place of residence without obtaining prior permission and failing to notify his supervising officer; (2) failing to report for scheduled appointments on 20 March 2014, 24 March 2014, and 28 March 2014; (3) being in arrears in the amount of $587.00 for his court indebtedness; and (4) being in arrears in the amount of $360.00 for his probation supervision fees. The violation reports also stated: "Furthermore, the Defendant has failed to make his whereabouts known to the probation department therefore the Defendant is declared an absconder."

Over a month later, Officer Clark filed an additional probation violation report on 19 June 2014. This report contained the same allegations against Defendant for willfully violating his probation conditions as the 7 May 2014 reports.

A probation violation hearing was held on 28 January 2015 in Nash County Superior Court. At the beginning of the hearing, Defendant's counsel stated: "Judge, [Defendant] admits the fact that he's an absconder." Defendant's counsel explained Defendant

> was working in Johnston County for a construction company and was . . . getting up early and going to work and getting home late, coming home. And the young lady that he was living with, the mother of his children, was in contact with the probation officer and was making all the arrangements with respect to the appointments [with his probation officer.] She was telling him what was required of him and . . . he was giving her money he was earning working his job and . . . he thought she was making the payments for him and that he was in good standing. Ultimately, Judge, he found out that she was deceiving him in many ways. They have parted ways, she is now in prison, but he was working and in his mind he was in good standing with the probation officer. *Now, eventually he found that he was not, and he did not immediately turn himself in. He was picked up*. So that's where he is at fault.

(emphasis supplied).

Officer Clark testified the woman to whom Defendant had entrusted handling his probation matters was arrested on 24 June 2014, when "she was picked up in Johnston County and there was a meth lab found in the hotel room where [she and Defendant] were staying." Officer Clark

added that Defendant remained at-large, with his whereabouts unknown, and "was not captured until August of 2014 in McDowell County."

The trial court determined Defendant "was in willful violation [of his probation] without lawful excuse[.]" The trial court revoked Defendant's probation and activated his suspended sentences of four consecutive terms of 19 to 32 months imprisonment. Defendant gave timely notice of appeal to this Court.

II. Issue

Defendant argues the trial court erred by revoking his probation and activating his suspended sentences, without statutory authority to do so.

III. Standard of Review

> A proceeding to revoke probation is often regarded as informal or summary, and the court is not bound by strict rules of evidence. An alleged violation by a defendant of a condition upon which his sentence is suspended need not be proven beyond a reasonable doubt. All that is required is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has violated a valid condition upon which the sentence was suspended. The findings of the judge, if supported by competent evidence, and his judgment based thereon are not reviewable on appeal, unless there is a manifest abuse of discretion.

State v. Tennant, 141 N.C. App. 524, 526, 540 S.E.2d 807, 808 (2000) (citations and internal quotation marks omitted). An abuse of discretion will be found when the trial court's ruling is "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Campbell*, 359 N.C. 644, 673, 617 S.E.2d 1, 19 (2005) (citation omitted), *cert. denied*, 547 U.S. 1073, 164 L. Ed. 2d 523 (2006). "Nonetheless, when a trial court's determination relies on statutory interpretation, our review is *de novo* because those matters of statutory interpretation necessarily present questions of law." *Moore v. Proper*, 366 N.C. 25, 30, 726 S.E.2d 812, 817 (2012) (citations omitted).

IV. Analysis

A. Notice of Appeal

We first address the sufficiency of Defendant's *pro se* notice of appeal. N.C. Gen. Stat. § 15A-1347 provides defendants with a statutory

right to appeal judgments entered, which revoke probation, as provided under N.C. Gen. Stat. § 7A-27. N.C. Gen. Stat. § 15A-1347(a) (2015).

Defendant timely filed written notice of appeal on 9 February 2015. The Office of the Appellate Defender was appointed to represent him on 12 February 2015. Defendant acknowledges his notice of appeal did not "designate the judgment or order from which appeal is taken" or "the court to which appeal is taken," as required by Rule 4(b) of the North Carolina Rules of Appellate Procedure. N.C.R. App. P. Rule 4(b). There was also no indication the Nash County District Attorney's Office was served with the notice. *Id.* Defendant concedes his written notice failed to conform to the requirements of Rule 4 in several respects.

Defendant has filed a petition for writ of certiorari in this Court, in which he seeks appellate review in the event his notice of appeal is deemed to be insufficient. In light of Rule 4, discussed *supra*, we dismiss Defendant's appeal due to failure to file proper notice of appeal. In our discretion, we grant Defendant's petition for writ of certiorari for the purpose of reviewing the judgment from the trial court. N.C.R. App. P. 21(a)(1) ("The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]"). *See also State v. Crawford*, 225 N.C. App. 426, 427, 737 S.E.2d 768, 770, *disc. review denied*, 366 N.C. 590, 743 S.E.2d 196 (2013); *State v. Talbert*, 221 N.C. App. 650, 651, 727 S.E.2d 908, 910 (2012).

B. Probation Revocation

Defendant argues the trial court erred by revoking his probation and activating his sentences based upon impermissible grounds under the Justice Reinvestment Act. We disagree.

Probation violation hearings are generally informal, summary proceedings and the alleged probation violations need not be proven beyond a reasonable doubt. *State v. Duncan*, 270 N.C. 241, 245-46, 154 S.E.2d 53, 57 (1967). The burden of proof rests upon the State to show a defendant willfully violated his probation conditions. *State v. Seagraves*, 266 N.C. 112, 113-14, 145 S.E.2d 327, 329 (1965).

The State must present substantial evidence of each probation violation. *State v. Millner*, 240 N.C. 602, 605, 83 S.E.2d 546, 548 (1954). "All that is required is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant

has violated a valid condition upon which the sentence was suspended." *State v. Robinson*, 248 N.C. 282, 285-86, 103 S.E.2d 376, 379 (1958) (citations omitted).

"The minimum requirements of due process in a final probation revocation hearing . . . shall include . . . a written judgment by the [trial court] which shall contain (a) findings of fact as to the evidence relied on, [and] (b) reasons for revoking probation." *State v. Williamson*, 61 N.C. App. 531, 533-34, 301 S.E.2d 423, 425 (1983) (citations omitted). Findings of fact noted by the trial court on pre-printed, standard forms are sufficient to comply with the statutory and due process requirements. *State v. Henderson*, 179 N.C. App. 191, 197, 632 S.E.2d 818, 822 (2006).

The trial court has authority to alter or revoke a defendant's probation pursuant to N.C. Gen. Stat. § 15A-1344(a). The Justice Reinvestment Act of 2011 ("the JRA") amended this subsection to provide that a trial court may revoke probation and activate the suspended sentence *only* if a defendant: (1) commits a new criminal offense in violation of N.C. Gen. Stat. § 15A-1343(b)(1); (2) absconds supervision in violation of N.C. Gen. Stat. § 15A-1343(b)(3a); or (3) violates a condition of probation after serving two prior periods of confinement in response to violations under N.C. Gen. Stat. § 15A-1344(d2). N.C. Gen. Stat. § 15A-1344(a) (2015). For all other probation violations, the trial court may modify the terms and conditions of probation or impose a ninety-day period of confinement in response to a violation. *Id.*

N.C. Gen. Stat. § 15A-1343(b)(3a) mandates, as a regular condition of probation, a defendant must "[n]ot abscond by willfully avoiding supervision or by willfully making [his] whereabouts unknown to the supervising probation officer, if the defendant is placed on supervised probation." N.C. Gen. Stat. § 15A-1343(b)(3a) (2015).

1. *State v. Williams*

Defendant argues the violation reports merely alleged violations of N.C. Gen. Stat. §§ 15A-1343(b)(2) and (b)(3), neither of which are sufficient to revoke his probation and activate his suspended sentences pursuant to the JRA. Defendant contends no evidence was submitted at his probation revocation hearing, which would allow the trial court to find he had absconded within the meaning of, and under the amendments to, the JRA to allow the trial court to revoke his probation.

In support of his argument, Defendant relies on this Court's recent decision in *State v. Williams*, __ N.C. App. __, 776 S.E.2d 741 (2015). In *Williams*, the probation officer alleged the defendant was not reporting

as instructed and leaving the state without permission, as evidence that the defendant was absconding. The probation officer testified although the defendant had missed several scheduled appointments, he and the defendant had spoken via telephone on multiple occasions during this time period.

This Court held the State "failed to prove a violation of the absconding provision in N.C. Gen. Stat. § 15A-1343(b)." *Williams*, __ N.C. App. at __, 776 S.E.2d at 742. The evidence presented by the State in *Williams* merely showed the defendant was violating his probation by not reporting to his probation officer as directed and leaving the jurisdiction of the court without permission. Notably, the defendant in *Williams* was *not* "willfully avoiding supervision" or "willfully making [his] whereabouts unknown" because he had remained in contact with his probation officer throughout the time period of his alleged violations. N.C. Gen. Stat. § 15A-1343(b)(3a). This Court held this evidence alone was insufficient to show the defendant was absconding, in violation of N.C. Gen. Stat. § 15A-1343(b)(3a). *Id.*

Furthermore, the trial court in *Williams* concluded the hearing by stating: "The court finds Defendant in willful violation of the terms and conditions of probation, and his probation is revoked and his sentence is activated." *Williams*, __ N.C. App. at __, 776 S.E.2d at 744. This statement, without more, made it impossible for this Court to determine whether the trial court had revoked the defendant's probation for violation of a general condition of probation, or one of the specifically enumerated violations in the JRA, for which it is permissible for a court to revoke a defendant's probation and activate his suspended sentence.

We find *Williams* to be distinguishable from the facts and findings at bar. Here, the evidence of record, including allegations contained within the violation reports and the testimony at Defendant's probation revocation hearing, were sufficient for the trial court to find and conclude Defendant had willfully absconded under N.C. Gen. Stat. § 15A-1343(b)(3a), revoke his probation, and activate his suspended sentences. The violation reports alleged, and the evidence and admissions at the hearing clearly show, Defendant not only moved from his place of residence, without notifying or obtaining prior permission from his probation officer, but willfully avoided supervision for multiple months and failed to make his whereabouts known to his probation officer at any time thereafter. The testimony and admissions at Defendant's hearing revealed Defendant did not notify, and was not in contact with, his probation officer; rather, he relied on the woman with whom he was living to serve as

the "liaison" between himself and his probation officer, and to make his required payments.

2. Absconding

At Defendant's probation revocation hearing, Defendant's counsel conceded: "Judge, [Defendant] admits the fact that he's an absconder." Counsel for Defendant explained even after Defendant learned he was not in "good standing" with his probation officer, he failed to "immediately turn himself in." Officer Clark testified he was unaware of Defendant's whereabouts and Defendant "was not captured until August of 2014 in McDowell County[,]" far across the state from his registered residence in Nash County, three months after the alleged violations had occurred.

Following Defendant's hearing, the trial court completed a "Judgment and Commitment Upon Revocation of Probation – Felony" form. The trial court checked the appropriate boxes to indicate: (1) it had considered the record, together with the evidence presented by the parties; (2) Defendant was charged with allegations contained within the violation reports; (3) Defendant waived a violation hearing and admitted he had violated each of the conditions of his probation, as alleged in the violation reports; and (4) the trial court's decision to revoke Defendant's probation and activate his suspended sentences was based on his willful violation of the condition that he not abscond from supervision.

The State presented substantial evidence Defendant had "willfully avoid[ed] supervision" and "willfully ma[de his] whereabouts unknown" to "reasonably satisfy" the trial judge Defendant had violated the conditions of his probation by willfully absconding. N.C. Gen. Stat. § 15A-1343(b)(3a); *Robinson*, 248 N.C. at 285-86, 103 S.E.2d at 379. The trial court lawfully revoked Defendant's probation and activated his suspended sentences. This argument is overruled.

V. Conclusion

The State presented sufficient evidence to show Defendant had willfully violated the conditions of his probation by absconding. The State satisfied its evidentiary burden, and the trial court properly exercised its statutory authority under the JRA to revoke Defendant's probation and activate his suspended sentences. The trial court's findings of fact were sufficient to support the trial court's conclusion and decision to revoke Defendant's probation. *Henderson*, 179 N.C. App. at 197, 632 S.E.2d at 822. The trial court's judgment is affirmed.

AFFIRMED.

Judges CALABRIA and DAVIS concur.

STATE v. JOHNSON

[246 N.C. App. 139 (2016)]

STATE OF NORTH CAROLINA
v.
JAKECO JOHNSON

No. COA15-1051

Filed 1 March 2016

1. Probation and Parole—probation revoked—absconding by willfully avoiding supervision—not reporting for office visit

The trial court erred by revoking defendant's probation and activating his suspended sentence based on its conclusion that defendant absconded by willfully avoiding supervision. When defendant told his probation officer that he would not be able to report to the probation office the following day and in fact did not report to the scheduled office visit, his actions did not rise to the level of "absconding supervision" in violation of N.C.G.S. § 15A-1343(b)(3a). These exact actions, without more, violate the explicit language of a regular condition of probation that does not allow for revocation.

2. Probation and Parole—probation revoked—violation of house arrest condition

The trial court erred by revoking defendant's probation and activating his suspended sentence based on its conclusion that defendant violated the special condition of house arrest with electronic monitoring. While defendant's unauthorized trips out of his "home zone" clearly violated the special condition of probation, they did not constitute either the commission of a new crime or absconding by willfully avoiding supervision. N.C.G.S. § 15A-1344(a) did not authorize revocation based upon violations of the rules and regulations of the electronic house arrest program unless the requirements of N.C.G.S. § 15A-1344(d2) were met.

Appeal by defendant from judgment entered 13 May 2015 by Judge Hugh B. Lewis in Catawba County Superior Court. Heard in the Court of Appeals 10 February 2015.

Attorney General Roy Cooper, by Assistant Attorney General Jason R. Rosser, for the State.

Stephen G. Driggers for defendant-appellant.

TYSON, Judge.

Jakeco Johnson ("Defendant") appeals from judgment and commitment upon revocation of probation. We vacate the orders revoking Defendant's probation and remand for further proceedings.

I. Background

On 10 December 2014, Defendant appeared before the Catawba County Superior Court and pled guilty, pursuant to an *Alford* plea, to discharge of a weapon into occupied property and possession of a firearm by a convicted felon. In exchange, the State agreed to dismiss the charge of assault with a deadly weapon with intent to kill.

The court accepted Defendant's plea. On the charge of discharge of a weapon into occupied property, the court sentenced Defendant to 29 to 47 months imprisonment. On the charge of possession of a firearm by a felon, the court sentenced Defendant to 14 to 26 months imprisonment. Both sentences were suspended while Defendant served 36 months of supervised probation. As an additional condition of Defendant's probation, he was ordered to submit to house arrest with electronic monitoring for a period of 120 days.

Defendant's case was assigned to Probation Officer Joshua Benfield ("Officer Benfield"). Over the course of his supervision of Defendant, Officer Benfield filed three violation reports: two on 16 January 2015, and a third on 16 March 2015.

One of the 16 January 2015 Violation Reports alleged Defendant had violated the terms of his probation by: (1) willfully absconding; (2) using, possessing, or controlling a controlled substance; (3) failing to report as directed by his probation officer; and (4) failing to pay court costs. The second 16 January 2015 Violation Report repeated the first three allegations, and additionally alleged: (1) Defendant failed to pay different amounts of court costs; and (2) Defendant left his residence while on house arrest several times spanning five days. The 16 March 2015 Violation Report alleged Defendant had violated one condition of probation: making unauthorized trips to unapproved locations while under house arrest.

A revocation hearing was held 7 May 2015. Officer Benfield testified concerning the factual basis undergirding the two 16 January 2015 and the 16 March Violation Reports. Regarding the allegation asserting Defendant had absconded contained in the two 16 January 2015 Violation Reports, Officer Benfield testified he visited with Defendant at his residence on 12 January 2015 and informed Defendant his first office visit would be the next day.

Officer Benfield testified Defendant told him on 12 January 2015 that he would not report for the office meeting scheduled for the following day. Officer Benfield testified Defendant failed to report to the 9:00 a.m. meeting, despite receiving an "electronic message" ordering him to report.

At the hearing, Defendant testified he told Officer Benfield he did not have a car, would not be able to find a ride to the probation office at 9:00 a.m., and asked if he could meet at a later time. Officer Benfield rejected Defendant's request, and instructed him to arrive on time. At the hearing, Officer Benfield explained probationers do not have a choice regarding attendance at meetings with their probation officers.

During Officer Benfield's testimony, the following colloquy occurred:

> [Prosecutor]: Is there anything else regarding [Defendant] and his probation violations?
>
> [Officer Benfield]: None other than the regular condition of -- his regular conditions of probation, number five where it says "Not abscond by willfully avoiding supervision or making your whereabouts unknown." I would believe that when he tells the probation officer that he has -- he is not coming to probation then that is willfully absconding.
>
> [Prosecutor]: Let me ask you a question regarding that. Is it willfully abscond or have your whereabouts unknown?
>
> [Officer Benfield]: That is correct.
>
> [Prosecutor]: So his willful absconding by not reporting that would be a violation of probation through your training and experience?
>
> [Officer Benfield]: That is correct.

On cross-examination, Officer Benfield admitted the electronic monitoring device Defendant wore transmitted all of Defendant's locations and movements to the officer.

At the close of the revocation hearing, the trial court concluded Defendant's "statement to [Officer Benfield] on [12 January 2015] that he wasn't going to show up" to his scheduled meeting on 13 January 2015 "satisfies the absconding by willfully avoiding supervision" condition of probation. The court thereafter entered judgment and revoked

Defendant's probation in each of Defendant's sentences using a preprinted form ("Form AOC-CR-607").

Defendant gave notice of appeal in open court.

II. Issue

Defendant's sole argument is that the trial court erred by revoking his probation and activating his suspended sentences. He argues the State failed to prove a violation of the "absconding provision" of N.C. Gen. Stat. § 15A-1343(b)(3a).

III. Standard of Review

A hearing to revoke a defendant's probationary sentence "only requires that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended." *State v. Young*, 190 N.C. App. 458, 459, 660 S.E.2d 574, 576 (2008) (citation and quotation marks omitted). "The judge's finding of such a violation, if supported by competent evidence, will not be overturned absent a showing of manifest abuse of discretion." *Id.* "Nonetheless, when a trial court's determination relies on statutory interpretation, our review is *de novo* because those matters of statutory interpretation necessarily present questions of law." *Moore v. Proper*, 366 N.C. 25, 30, 726 S.E.2d 812, 817 (2012) (citations omitted).

IV. "Absconding Provision" of N.C. Gen. Stat. § 15A-1343(b)(3a)

Conditions of probation are set out in N.C. Gen. Stat. § 15A-1343. N.C. Gen. Stat. § 15A-1343 (2015). Under North Carolina's statutory scheme, sixteen "regular conditions" of probation "apply to each defendant placed on supervised probation" unless specifically exempted by the presiding judge when the sentence is imposed. *See* N.C. Gen. Stat. §§ 15A-1343(b)(1)-(16). Included in the sixteen regular conditions, as relevant here, a defendant must: (1) "Commit no criminal offense in any jurisdiction;" (2) "Report as directed by the court or his probation officer to the officer at reasonable times and places and in a reasonable manner;" and (3) "Not abscond by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer, if the defendant is placed on supervised probation." N.C. Gen. Stat. §§ 15A-1343(b)(1), (b)(3), (b)(3a).

In addition to the regular conditions of probation, a trial court imposing community or intermediate punishment, including probation, may impose any of the conditions provided in N.C. Gen. Stat.

§ 15A-1343(a1). As relevant here, the court also imposed the additional condition of house arrest with electronic monitoring. N.C. Gen. Stat. § 15A-1343(a1)(1).

A. 2011 JRA Statutory Amendments

In 2011, our General Assembly enacted N.C. Sess. Law 2011-192, known as the Justice Reinvestment Act ("JRA"). The JRA was a "part of a national criminal justice reform effort" which, among other changes, "made it more difficult to revoke offenders' probation and send them to prison." Jeff Welty, *Article: Overcriminalization in North Carolina*, 92 N.C.L. Rev. 1935, 1947 (2014).

Prior to enactment of the JRA, a court could revoke probation and activate the suspended sentence for *any* violation of the conditions of probation. *See*, *e.g.*, *State v. Tozzi*, 84 N.C. App. 517, 521, 353 S.E.2d 250, 253 (1987) ("Any violation of a valid condition of probation is sufficient to revoke defendant's probation."). After enactment of the JRA, however, a court may revoke probation and activate a previously suspended sentence *only* in the three circumstances provided in N.C. Gen. Stat. § 15A-1344(a). N.C. Gen. Stat. § 15A-1344(a) provides in relevant part:

> Authority to Alter or Revoke. - . . . The court may only revoke probation for a violation of a condition of probation under [N.C. Gen. Stat. §] 15A-1343(b)(1) or [N.C. Gen. Stat. §] 15A-1343(b)(3a), except as provided in [N.C. Gen. Stat. §] 15A-1344(d2). Imprisonment may be imposed pursuant to [N.C. Gen. Stat. §] 15A-1344(d2) for a violation of a requirement other than [N.C. Gen. Stat. §] 15A-1343(b)(1) or [N.C. Gen. Stat. §] 15A-1343(b)(3a).

N.C. Gen. Stat. § 15A-1344(a) (2015).

Defendant argues the trial court could not revoke his probation and activate the suspended sentences on both of the underlying judgments because the findings of fact fail to show Defendant "absconded." We consider each revocation in turn.

B. Revocation in 13 CRS 056075 – Possession of a Firearm by a Felon

[1] The Form AOC-CR-607 the trial court used in case 13 CRS 056075 included, *inter alia*, a "Findings" section. In the "Findings" section, the court found as fact that "the condition(s) violated and the facts of each violation are as set forth . . . in paragraph(s) 1-4 of the Violation Report or Notice dated 01/16/2015." The court found Defendant had "willfully and without valid excuse" committed the violations listed in the 16 January 2015 Violation Reports.

The court also checked a box on the form indicating it "may revoke [Defendant's] probation . . . for the willful violation of the condition(s) that he . . . not commit any criminal offense, [N.C. Gen. Stat. §] 15A-1343(b)(1), or abscond from supervision, [N.C. Gen. Stat. §] 15A-1343(b)(3a), as set out" in the "Findings" section. Pursuant to the trial court's order revoking probation in case 13 CRS 056075, the findings of fact supporting the trial court's revocation were contained in paragraphs one through four of the 16 January 2015 Violation Reports.

Defendant makes no argument the trial court erred in finding he violated paragraphs two through four of the 16 January 2015 Violation Reports. The violations found in paragraphs two through four could not result in revocation and activation of the suspended sentence, unless the statutorily required process provided by N.C. Gen. Stat. § 15A-1344(d2) has been completed, which is not the case here. N.C. Gen. Stat. §§ 15A-1343(a1)(1); 15A-1343(b)(3), (b)(9), (b)(15); 15A-1344(a), (d2).

Defendant argues the evidence, statutes, and case law do not support a conclusion that he "absconded" in violation of N.C. Gen. Stat. § 15A-1343(b)(3a). The only finding of fact which asserts Defendant absconded is contained in paragraph one of the 16 January 2015 Violation Reports:

> Of the conditions of probation imposed [], [Defendant] has willfully violated: . . . Regular Condition of Probation: "Not to abscond, by willfully avoiding supervision or by willfully making the supervisee's whereabouts unknown to the supervising probation officer" in that, THE DEFENDANT IS WILLFULLY AVOIDING SUPERVISION BY PROBATION. THE DEFENDANT TOLD PROBATION ON 01-12-2015 THAT HE WOULD NOT REPORT TO THE PROBATION OFFICE FOR HIS MONTH [sic] OFFICE VISIT ON 01-13-2015. THE DEFENDANT FAILED TO REPORT TO PROBATION ON 1-13-15. THEREFORE THE DEFENDANT IS ABSCONDING BY WILLFULLY AVOIDING SUPERVISION.

In *State v. Williams*, ___ N.C. App. ___, 776 S.E.2d 741 (2015), this Court discussed the statutory amendments made by the JRA, which limited a trial court's ability to revoke probation. The Court noted the JRA limited a trial court's authority to revoke probation to *only* those circumstances in which the probationer: (1) commits a new crime in violation of N.C. Gen. Stat. § 15A-1343(b)(1); (2) absconds supervision in violation of N.C. Gen. Stat. § 15A-1343(b)(3a); or (3) violates any condition

of probation after serving two prior periods of CRV [confinement in response to violations] pursuant to N.C. Gen. Stat. § 15A-1344(d2). *Id.* at ___, 776 S.E.2d at 742. "[U]nder these revised provisions, the trial court may only revoke probation if the defendant commits a criminal offense or absconds[,] and may impose a ninety-day period of confinement for a probation violation other than committing a criminal offense or absconding." *State v. Tindall*, 227 N.C. App. 183, 185, 742 S.E.2d 272, 274 (2013) (citation and internal quotation marks omitted)).

The finding of fact in the trial court's order revoking Defendant's probation in case 13 CRS 056075 alleges Defendant "absconded" when he told the officer he would not report to the probation office and, in fact, did not report to the scheduled office visit the following day. Under this Court's precedents, these actions, while clearly a violation of N.C. Gen. Stat. § 15A-1343(b)(3), are not a commission of a new crime in violation of N.C. Gen. Stat. § 15A-1343(b)(1), and do not rise to "absconding supervision" in violation of N.C. Gen. Stat. § 15A-1343(b)(3a).

The policy decision on what conduct is sufficient to allow the court to revoke probation and activate a suspended sentence was clearly changed by the General Assembly upon its passage of the JRA in 2011. *Compare* N.C. Gen. Stat. § 15A-1344(a) (2010) (allowing revocation of probation for a violation of any one or more conditions of probation), *with* N.C. Gen. Stat. § 15A-1344(a) (2015) (allowing revocation of probation *only* for a violation of a condition of probation under N.C. Gen. Stat. § 15A-1343(b)(1) or N.C. Gen. Stat. § 15A-1343(b)(3a), except as provided in N.C. Gen. Stat. § 15A-1344(d2)).

Our Supreme Court has stated "a statute should not be interpreted in a manner which would render any of its words superfluous." *State v. Coffey*, 336 N.C. 412, 417, 444 S.E.2d 431, 434 (1994) (citations omitted). Instead, "[w]e construe each word of a statute to have meaning, where reasonable and consistent with the entire statute, because it is always presumed that the legislature acted with care and deliberation." *Id.* at 418, 444 S.E.2d 431, 434 (citation omitted).

Consistent with these principles of interpretation and this Court's controlling precedents in *Williams* and *Tindall*, "[w]e do not believe our General Assembly, in amending the probation statutes, intended for [a] violation[]" of a condition of probation other than N.C. Gen. Stat. § 15A-1343(b)(1) or N.C. Gen. Stat. § 15A-1343(b)(3a) "to result in revocation, unless the requirements of N.C. Gen. Stat. § 15A-1344(d2) have been met." *Williams*, ___ N.C. App. at ___, 776 S.E.2d at 745.

Under this standard, a defendant informing his probation officer he would not attend an office visit the following day and then subsequently failing to report for the visit, does not, without more, violate N.C. Gen. Stat. § 15A-1343(b)(3a) when these *exact actions* violate the explicit language of a wholly separate regular condition of probation which does not allow for revocation and activation of a suspended sentence. N.C. Gen. Stat. § 15A-1343(b)(3); *Williams*, ___ N.C. App. at ___, 776 S.E.2d at 745.

To hold otherwise would render portions of N.C. Gen. Stat. § 15A-1344(a) superfluous. Allowing actions which explicitly violate a regular or special condition of probation other than those found in N.C. Gen. Stat. § 15A-1343(b)(1) or N.C. Gen. Stat. § 15A-1343(b)(3a) to also serve, without the State showing more, as a violation of N.C. Gen. Stat. § 15A-1343(b)(1) or N.C. Gen. Stat. § 15A-1343(b)(3a) would result in revocation of probation without following the mechanism the General Assembly expressly provided in N.C. Gen. Stat. § 15A-1344(d2). Such a result would render portions of the statutory language in N.C. Gen. Stat. § 15A-1344(a) wholly duplicative and superfluous. Under a contrary interpretation of the statutory language, there would have been no reason for the General Assembly to specifically list any statutes in N.C. Gen. Stat. § 15A-1344(a), or to enact N.C. Gen. Stat. § 15A-1344(d2) to limit the circumstances for which a court may revoke probation and activate a suspended sentence.

In 13 CRS 056075, the trial court found Defendant had absconded by informing Officer Benfield he would not attend an office visit scheduled for the following morning, and thereafter failing to attend the meeting. While Defendant's actions clearly violated the general condition of probation listed in N.C. Gen. Stat. § 15A-1343(b)(3), such actions, without more, do not also allow the trial court to activate Defendant's suspended sentence for violation of N.C. Gen. Stat. § 15A-1343(b)(3a). Defendant's "whereabouts" were never "unknown" by Officer Benfield.

While the positions of the officer and trial court are understandable, we are bound by our precedents. *Williams*, ___ N.C. App. at ___, 776 S.E.2d at 745; *Tindall*, 227 N.C. App. at 185, 742 S.E.2d at 274. The statute does not allow the trial court to revoke Defendant's probation and activate the suspended sentence on the bases cited in the judgment and order. Based upon the statute's text, well-settled methods of statutory construction, and this Court's precedents in *Williams* and *Tindall*, we vacate the trial court's revocation of probation and activation of Defendant's suspended sentence in case 13 CRS 056075.

C. Revocation in 13 CRS 056074 – Discharge of a Weapon into Occupied Property

[2] The "Findings" section of Form AOC-CR-607 in case 13 CRS 056074 states the court found as fact that "the condition(s) violated and the facts of each violation are as set forth. . . in Paragraph[] 1 of the Violation Report or Notice dated 03/16/2015." The court found Defendant had committed these violations "willfully and without valid excuse." As in case 13 CRS 056075, the court in case 13 CRS 056074 also checked a box indicating it "may revoke [Defendant's] probation. . . for the willful violation of the condition(s) that he. . . not commit any criminal offense, [N.C. Gen. Stat. §] 15A-1343(b)(1), or abscond from supervision, [N.C. Gen. Stat. §] 15A-1343(b)(3a), as set out above." Pursuant to the trial court's order revoking probation in case 13 CRS 056074, the sole finding of fact supporting the trial court's revocation was contained in paragraph one of the 16 March 2015 Violation Report.

Paragraph one of the 16 March 2015 Violation Report states Defendant "willfully violated" the condition of probation that he "[b]e assigned to the Electronic House Arrest/Electronic Monitoring program for the specified period and obey all rules and regulations of the program until discharge. . ." in that Defendant went to a grocery store, a park, and an apartment complex before returning to his "home zone" after leaving his attorney's office on 16 February 2015. Paragraph one of the 16 March 2015 Violation Report also stated Defendant went to two stores and an apartment complex after leaving the probation office on 3 March 2015. The 16 March 2015 Violation Report indicates all of these trips were "unapproved leaves" from Defendant's house arrest "and are all violations of electronic house arrest."

While these unauthorized trips clearly violate the special condition of probation of house arrest with electronic monitoring, they do not constitute either the commission of a new crime, in violation of N.C. Gen. Stat. § 15A-1343(b)(1), or absconding supervision, in violation of N.C. Gen. Stat. § 15A-1343(b)(3a). Defendant did not "abscond by willfully avoiding supervision" by making his whereabouts unknown during these trips. N.C. Gen. Stat. § 15A-1343(b)(3a). Officer Benfield testified he was able to monitor and keep continuous track of Defendant's locations and movements through the use of the electronic monitoring device Defendant wore.

The trial court adopted the 16 March 2015 Violation Report as its findings of fact. In doing so, the trial court found Defendant had violated the house arrest condition of his probation. The General Assembly, in

enacting the JRA, did not intend to or explicitly include a violation of the rules and conditions of house arrest to serve, without more, as a violation of N.C. Gen. Stat. § 15A-1343(b)(3a). *See Williams*, ___ N.C. App. at ___, 776 S.E.2d at 745.

The trial court found Defendant "willfully and without valid excuse" committed the violations as set forth in paragraph one of the 16 March 2015 Violation Report. Paragraph one of the 16 March 2015 Violation Report did not state Defendant had committed a new crime, and it did not state Defendant had willfully absconded. N.C. Gen. Stat. §§ 15A-1343(b)(1), (b)(3a).

N.C. Gen. Stat. § 15A-1344(a) does not authorize revocation based upon violations of the rules and regulations of the electronic house arrest program unless the requirements of N.C. Gen. Stat. § 15A-1344(d2) have been met. Under a faithful reading of the statute and our precedents, neither of the permissible bases for probation revocation has been shown by the evidence presented.

The statute does not allow the trial court to revoke Defendant's probation and activate his suspended sentences based upon the findings of facts listed in the judgment and commitment order. Based upon the current language of the statute and this Court's precedents, we vacate the trial court's revocation of probation and activation of Defendant's suspended sentence in case number 13 CRS 056074.

V. Conclusion

As currently written, N.C. Gen. Stat. § 15A-1344(a) does not permit the trial court to revoke Defendant's probation and activate his suspended sentences on the grounds set forth in its orders. Actions which violate N.C. Gen. Stat. § 15A-1343(b)(3) or N.C. Gen. Stat. § 15A-1343(a1)(1), without the State showing more, may not also serve as violations of N.C. Gen. Stat. §15A-1343(b)(3a). *See Williams*, ___ N.C. App. at ___, 776 S.E.2d at 745.

The interpretation advanced by the State would render portions of N.C. Gen. Stat. § 15A-1344(a) superfluous. Applying the statute as written and this Court's binding precedents, the judgment and commitment in 13 CRS 056074 and 13 CRS 056075 are vacated. This case is remanded for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges CALABRIA and DAVIS concur.

STATE OF NORTH CAROLINA
v.
JAHAAD TARIEM MARSHALL, DEFENDANT

No. COA15-560

Filed 1 March 2016

1. Criminal Law—instructions—pattern jury instead of requested instruction

The trial court did not abuse its discretion in a prosecution for multiple offenses arising from a burglary and sexual offenses by giving the Pattern Jury Instruction on intent instead of defendant's requested instruction. The trial court is not required to adopt the precise language requested by either party, even if that language is a correct statement of the law. Moreover, defendant's requested instruction addressed only two of the many offenses charged and involved only specific intent, not general intent, which risked confusing the jury.

2. Appeal and Error—preservation of issues—no objection below

An issue involving the trial court's deviation from the Pattern Jury Instructions was not preserved for appeal where defendant did not object below. Requesting the use of defendant's requested instruction was not sufficient to preserve an objection to the trial court's added language.

3. Criminal Law—instructions—no plain error—substantial evidence supporting convictions

There would be no plain error arising from the trial court's instructions, even had defendant argued it in his brief, in a prosecution for multiple offenses arising from a burglary and sexual assault where there was substantial evidence supporting each of the convictions.

4. Sexual Offenses—attempted first-degree sexual offense—sufficiency of evidence—intent—continuous sexual assault and rape

The evidence of attempted first-degree sexual offense was sufficient to support the jury's verdict of guilty where the jury could infer defendant's intent to compel the victim to perform fellatio. The facts of the case further supported the inference that defendant intended to commit both first-degree rape and first-degree sexual offense.

STATE v. MARSHALL

[246 N.C. App. 149 (2016)]

Appeal by defendant from judgments entered 28 March 2014 by Judge Henry W. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 5 November 2015.

Attorney General Roy Cooper, by Assistant Attorney General Mary Carla Babb, for the State.

Assistant Appellate Defender Paul M. Green, for defendant.

DIETZ, Judge.

On 7 January 2013, Jahaad Marshall and his brother broke into a Raleigh home, woke a husband and wife in their downstairs bedroom, and demanded money. Marshall and his brother separated the couple as they rummaged through the house. While Marshall stood at the top of the stairs, Marshall's brother took the wife into a room downstairs, forced her to remove her clothes, and then forced her to perform oral sex on him.

Marshall's brother then led the wife, still nearly naked, up the stairs, where Marshall was waiting. As Marshall's brother went back downstairs to check on the husband, Marshall ran his hand over the wife's breast and buttocks and said, "Nice."

At this point, the husband, who was being held in the downstairs bedroom, realized his wife was in danger. He began fighting with Marshall and his brother, both of whom were armed with handguns. His struggle with the two armed men lasted long enough for his wife to escape and call for help, but he was shot in the back, struck in the head, and left for dead as Marshall and his brother fled the scene.

After a high-speed chase, police caught Marshall and his brother and recovered numerous items stolen from the home, including the husband's wallet and the wife's phone. A jury convicted Marshall of more than a dozen felonies, including attempted murder, assault with intent to kill, burglary, and numerous attempted sex offenses. The trial court sentenced Marshall to nearly 250 years in prison.

Marshall raises two issues on appeal. First, during deliberations the jury asked the trial court to explain "the legal definition of intent." The State proposed that the court read to the jury the pattern instruction on intent. Marshall proposed a custom instruction that discussed specific intent, a standard applicable to some, but not all, of the charges. The

court chose to give the State's instruction. Marshall argues on appeal that the trial court erred by choosing the State's instruction over his, and also by adding a sentence not requested by the State and not contained in the pattern instruction.

As explained below, the trial court's decision to use the State's requested instruction was well within the court's broad discretion and was not erroneous. With respect to the sentence added by the trial court, Marshall did not object to that portion of the instruction and did not argue plain error on appeal. Thus, we decline to review the issue because it is unpreserved. We note, however, that in light of the substantial evidence of guilt in this case, even if we were to review this issue for plain error, we would fine none.

Marshall also argues that there was insufficient evidence to convict him of both attempted first-degree sex offense and attempted first-degree rape. Marshall contends that the evidence was only sufficient to permit the jury to infer the intent to commit one of those offenses, not both.

As explained below, we reject this argument. Marshall and his brother isolated the victim from her husband and one said, "Maybe we should," to which the other responded, "Yeah." Marshall's brother then forced the victim to remove her clothes and perform fellatio on him at gunpoint. Marshall later groped the victim's breast and buttocks and said, "Nice." At this point, the victim's husband, who had been confined in another room, realized his wife was in danger and fought back to protect her.

Under long-standing legal precedent discussed in more detail below, this evidence is sufficient for a reasonable jury to infer that Marshall intended to engage in a continuous sexual assault involving both fellatio (like his brother) and ultimately rape, and that this continuous sexual assault was thwarted only because the victim's husband sacrificed himself so that his wife could escape. Accordingly, we reject Marshall's argument and find no error in his conviction and sentence.

Facts and Procedural History

At approximately 3:00 a.m. on 7 January 2013, the victims in this case, a husband and wife, awoke to find Jahaad Marshall and his brother standing at the foot of their bed in their downstairs bedroom. Marshall and his brother, clad in ski-masks, ordered the couple out of the bed and onto the floor. The two brothers were armed with handguns and demanded money.

After rummaging through the home, Marshall and his brother ordered the wife into the hallway. Once they had isolated the wife from her husband, she overheard one of the brothers say, "Maybe we should" and the other respond, "Yeah," followed by laughter. Marshall's brother then led the wife to another room, forced her to remove her clothes, and forced her to perform fellatio while he held a gun to the side of her head. During this time, Marshall waited at the top of the stairs. Marshall's brother later pushed the wife toward the stairs where Marshall waited. When she reached the top of the stairs, Marshall, also holding a gun, grabbed her and ran his hand over her breast and buttocks and said, "Nice."

As Marshall groped the wife near the stairs, Marshall's brother went to the downstairs bedroom where the husband was held. The husband noticed that Marshall's brother was adjusting his pants and he yelled "Where's my wife? Is my wife ok?" The husband then began to struggle with Marshall's brother in an effort to escape and protect his wife. Marshall heard the struggle and joined the fight. This provided the wife with an opportunity to escape, and she jumped over the side of the stairs and ran out the front door. As she fled, she heard a gunshot.

When police arrived, they found the husband on the floor severely wounded. He had been shot in the spine, rendering him a paraplegic. He also suffered life-threatening internal bleeding from a bullet that had lodged just centimeters from his heart. He also sustained at least one severe blow to the head, a bruised lung, and a broken finger that required surgery.

A neighbor saw Marshall and his brother fleeing the scene and informed police. After a high-speed chase, police caught Marshall and his brother when the two wrecked their car. Police found the husband's wallet, the wife's iPhone, a black ski mask, and other evidence tying the brothers to the crime.

The State charged Marshall with numerous counts of burglary, kidnapping, sex offense, attempted rape, attempted sex offense, armed robbery, assault, attempted murder, larceny, possession of stolen goods, and possession of a firearm by a felon. Many of these charges relied on the theory that Marshall acted in concert with his brother, whom the State alleged directly committed the acts. The case went to trial and the jury found Marshall guilty of two counts of first-degree kidnapping, assault with a deadly weapon with intent to kill inflicting serious injury, attempted murder, two counts of armed robbery, first-degree sex offense, attempted first-degree rape, attempted first-degree sex offense, and

possession of a firearm by a convicted felon. The trial court sentenced Marshall to a minimum of 2,975 months in prison. Marshall appealed.[1]

Analysis

I. Jury Instructions

[1] Marshall first argues that the trial court erred when it answered the jury's question about the meaning of "intent." Specifically, Marshall argues that the trial court should have read to the jury the response that Marshall proposed and that the response the court actually provided was erroneous. As explained below, we reject Marshall's arguments.

We first address Marshall's argument that the trial court erred by failing to give his requested instruction on specific intent. Section 15A-1234 of the General Statutes permits the judge "to give appropriate additional instruction to . . . [r]espond to an inquiry of the jury made in open court." N.C. Gen. Stat. § 15A-1234(a)(1). Importantly, the trial court is not *required* to respond to a jury's questions during deliberations and, if it chooses to do so, the court's choice of whether to use counsel's requested response is "a matter within its discretion and will not be overturned absent a showing of abuse of discretion." *State v. Herring*, 322 N.C. 733, 742, 370 S.E.2d 363, 369 (1988).

Here, the jury asked the court for an explanation of "the legal definition of intent." The State requested that the court respond by providing the pattern jury instruction on intent:

> Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. You arrive at the intent of a person by such just and reasonable deductions from the circumstances proven as a reasonably prudent person would ordinarily draw therefrom.

N.C.P.I. -Crim. 120. 10.

Notably, this pattern jury instruction also includes a footnote setting out additional, optional instructions relating to specific intent and

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1. After pronouncing its sentence, the trial court stated that Marshall "objects and gives notice to the North Carolina Court of Appeals," but it is not clear from the record that Marshall in fact stated verbally, on the record, that he appealed. Marshall filed a petition for writ of certiorari in the event that his notice of appeal was inadequate. To ensure that this Court has appellate jurisdiction to address the merits of the case, we allow the petition for writ of certiorari.

general intent. *Id*. In this case, the State charged Marshall with multiple offenses that included both specific intent and general intent crimes.

Marshall asked the court to read a special, prepared instruction that did not include the pattern jury instruction language for intent but included language from the footnote in the pattern instruction concerning specific intent. Marshall's proposed instruction also referenced the crimes with which Marshall was charged that required specific intent, but not the other crimes with which Marshall was charged that required only general intent. This is Marshall's full proposed supplemental instruction:

> Attempted Murder and Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury are specific intent crimes. Specific Intent is a mental purpose, aim or design to accomplish a specific harm or result. If you do not find beyond a reasonable doubt that Jahaad Marshall acted with a specific intent to kill John Smith, then it would be your duty to return a verdict of not guilty on these charges.

Marshall's proposed instruction appeared to assume that the jury's intent question only related to the specific intent crimes, although the jury did not say that.

The State objected to the use of Marshall's proposed instruction on the ground that it was too specific and did not answer the question the jury actually asked. After hearing from the parties, the trial court chose to answer the jury's question using the pattern jury instruction on intent requested by the State, rather than Marshall's proposed instruction.

That decision was not an abuse of discretion. As noted above, a trial court is not required to adopt the precise language requested by either party, even if that language is a correct statement of the law. *Herring*, 322 N.C. at 742, 370 S.E.2d at 369. And here, the instruction requested by Marshall addressed only two of the many offenses with which Marshall was charged and, by referencing specific intent but not general intent, risked confusing the jury. Thus, we hold that the trial court did not abuse its discretion in declining to use Marshall's requested instruction.

[2] Marshall next argues that the trial court deviated from the pattern jury instruction on intent by adding an additional sentence stating that "[i]ntent is what a person reasonably expects or wants to occur." As explained below, this issue is not preserved for review.

It is well-settled that when the trial court proposes its own jury instruction during a charge conference—particularly when that instruction was not requested by either party—a party who wishes to challenge

that newly added instruction must object and state distinctly which portion of the instruction is objectionable and why. *See* N.C. R. App. P. 10(a)(2); *State v. Roache*, 358 N.C. 243, 305, 595 S.E.2d 381, 420-21 (2004), *State v. Carver*, 221 N.C. App. 120, 124, 725 S.E.2d 902, 905 (2012) *aff'd*, 366 N.C. 372, 736 S.E.2d 172 (2013) (per curiam).

Here, both Marshall and the State submitted proposed instructions to be given in response to the jury's question. The court chose the pattern jury instruction requested by the State, but then added its own final sentence that neither party requested. The transcript of this conference, out of the jury's presence, demonstrates that the parties knew the court added that final, unrequested sentence:

> THE COURT: Well, I'm considering giving the jury, without instruction, that intent is a mental attitude seldom proved by direct evidence. It must ordinarily be proved by circumstances by which it may be inferred. You arrive at the intent of a person by such just and reasonable deductions from the circumstances proven as a reasonably prudent person would ordinarily draw therefrom. *Intent is what a person reasonably expects or wants to occur.* How says the State?
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> MR. ZELLINGER: Your Honor, could you read that last sentence again?
>
> THE COURT: *Intent is what a person reasonably expects or wants to occur.*
>
> MR. ZELLINGER: State's satisfied.
>
> THE COURT: How says the defendant?
>
> MR. THOMAS: Your Honor, we would request an instruction for that specific intent, *but we don't need to be heard any further.*

Marshall's request that the court use his specific intent instruction is insufficient to preserve an objection to the newly added language from the trial court. The court already had heard from the parties and decided to provide the pattern jury instruction requested by the State, rather than the custom specific intent instruction submitted by Marshall. Now, the court proposed adding a new sentence not contained in the pattern jury instruction. To preserve an objection to *that* newly added sentence, which departed from the pattern instruction, Marshall needed to specifically object to *that* sentence and tell the trial court why it was improper.

See State v. Tirado, 358 N.C. 551, 574, 599 S.E.2d 515, 531 (2004); *State v. Ballard*, 193 N.C. App. 551, 554, 668 S.E.2d 78, 80 (2008).

If we were to hold that simply requesting that the court provide Marshall's desired instruction—which is what Marshall did—was sufficient to preserve an objection to this newly added sentence, it would undermine the purpose of requiring parties to state distinctly what portion of the jury instruction is objectionable and why. *See* N.C. R. App. P. 10(a)(2); *State v. Oliphant*, 228 N.C. App. 692, 696, 747 S.E.2d 117, 121 (2013) (Rule 10(a)(2)'s purpose is to encourage parties to inform the trial court of instructional errors so that it can correct them before the jury deliberates, thereby eliminating the need for a new trial.).

The parties already had debated which of their two proposed instructions was appropriate—the State's pattern jury instruction on intent, or Marshall's custom instruction on specific intent. The court chose the State's pattern jury instruction. When the trial court added its new sentence, not contained in the pattern instruction, and asked the parties if there were any objections, Marshall stated only "Your Honor, we would request an instruction for that specific intent, but we don't need to be heard any further." This fails to inform the trial court that Marshall found the newly added sentence to be erroneous. Accordingly, we hold that Marshall did not preserve his argument concerning the sentence added by the trial court.

[3] If an instructional error is not preserved below, it nevertheless may be reviewed for plain error when that error "is specifically and distinctly contended to amount to plain error" in the appellant's brief. N.C. R. App. P. 10(a)(4); *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). But Marshall does not argue plain error in his brief. In very rare circumstances, typically involving capital cases, our state's appellate courts have invoked Rule 2 of the Rules of Appellate Procedure to suspend the requirements of Rule 10 and review an argument under plain error analysis even where the appellant did not request that we do so. *See Gregory*, 342 N.C. at 584-85, 467 S.E.2d at 31-32.

Our Supreme Court recently reiterated that a finding of plain error should be "applied cautiously and only in the exceptional case" where the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *State v. Lawrence*, 365 N.C. 506, 516-17, 723 S.E.2d 326, 333 (2012). Here, in light of the substantial evidence supporting each of Marshall's convictions, we would not find that the trial court's alleged error rose to the level of plain error. Accordingly, we decline to invoke Rule 2 and hold that this issue is not preserved for appellate review.

II. Sufficiency of the Evidence

[4] Marshall next argues that the trial court should have granted his motion to dismiss the charge of attempted first-degree sexual offense for insufficient evidence. Specifically, Marshall argues that there was insufficient evidence for the jury to infer that he intended to force the victim to perform fellatio, the sexual act upon which the jury was instructed for that offense. As explained below, we reject this argument and find that there was sufficient evidence to support the jury's verdict.

"In reviewing a motion to dismiss based on the sufficiency of the evidence, the scope of the court's review is to determine whether there is substantial evidence of each element of the charged offense." *State v. Hardison*, ___ N.C. App. ___, 779 S.E.2d 505, 507 (2015). Substantial evidence is "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* The evidence must be considered in the light most favorable to the State and the State is entitled to every reasonable inference that might be drawn therefrom. *Id.*

Here, there was sufficient evidence for the jury to infer Marshall's intent to compel the victim to perform fellatio. The evidence showed that, after Marshall separated the victim from her husband, the victim overheard Marshall or his brother say, "Maybe we should," and the other respond, "Yeah." Shortly after, Marshall's brother forced the victim to remove her clothes and then forced her to perform fellatio on him at gunpoint.

Marshall's brother then pushed the victim toward the stairs where Marshall was waiting. When she reached the top of the stairs, Marshall, also armed with a gun, grabbed the victim, ran his hand over her breast and buttocks, and said, "Nice." This evidence, taken together and viewed in the light most favorable to the State, is sufficient for a reasonable jury to infer that, had the victim's husband not fought back in an effort to protect his wife, Marshall would have forced the victim to perform fellatio, as his brother previously had done.

Marshall also argues that there was insufficient evidence to infer that he intended to commit *both* first-degree rape and first-degree sex offense. We disagree. In *State v. Hall*, a case repeatedly cited by both parties, this Court noted that "sexually motivated assaults may give rise to an inference that defendant intended to rape his victim notwithstanding that other inferences also are possible." 85 N.C. App. 447, 452, 355 S.E.2d 250, 253-54 (1987). The Court then summarized a number of previous decisions, including the Supreme Court's decision in *State v. Whitaker*, 316 N.C. 515, 342 S.E.2d 514 (1986). In *Whitaker*, the assailant told the

victim "I want to eat you"—a slang phrase often used to describe cunnilingus—and instructed the victim to pull her pants down, at which point the victim resisted and ultimately escaped. *Id.* at 517, 342 S.E.2d at 516. The Supreme Court held there was sufficient evidence to infer intent to commit rape from that conduct. *Id.* at 519; 342 S.E.2d at 517.

We see nothing in *Whitaker* that suggests the State in that case could not also have charged the defendant with attempted first-degree sex offense based on the defendant's intent to commit cunnilingus, as evidenced from the statement "I want to eat you." As the Supreme Court observed in *Whitaker*, juries can infer that a defendant intends to engage in "continuous" sexual assaults that involve rape as well as other sex offenses. 316 N.C. at 520, 342 S.E.2d at 518.

When viewed in the light most favorable to the State, the particular facts in this case support that inference. Marshall and his brother isolated the victim from her husband and one said, "Maybe we should," to which the other responded, "Yeah." Marshall's brother then forced the victim to remove her clothes and perform fellatio on him at gunpoint. Marshall later groped the victim's breast and buttocks and said, "Nice." At this point, the victim's husband, who had been confined in another room, discovered that his wife was in danger and fought back to protect her. Under *Whitaker* and *Hall*, this evidence is sufficient for a reasonable jury to infer that Marshall intended to engage in a continuous sexual assault involving both fellatio (like his brother) and ultimately rape, and that this continuous sexual assault was prevented only because the victim's husband intervened and saved her from these crimes. Accordingly, we reject Marshall's argument.

Conclusion

We find no error in the trial court's judgments.

NO ERROR.

Judges McCULLOUGH and TYSON concur.

STATE OF NORTH CAROLINA
v.
MARTIN LUTHER PEELE

No. COA15-480

Filed 1 March 2016

1. Appeal and Error—supplement to the record—documents establishing jurisdiction—not introduced at trial

In a probation revocation case, defendant's motion on appeal to strike the State's Rule 9(b)(5) supplement was granted where the supplement was filed to submit certain documents which had not been presented to the trial court and which would have conferred subject matter jurisdiction on the trial court.

2. Probation and Parole—revocation—after probation period ends

The trial court did not have jurisdiction to revoke probation and reinstate the active sentence where defendant's probation period ended before the violation report was filed.

3. Judgments—clerical errors—remanded for correction

Judgments revoking probation were remanded for the correction of clerical errors where the trial court erroneously marked the boxes for the underlying offenses, a subsequent inquiry would erroneously show that defendant had convictions involving domestic violence, the errors did not affect the sentences imposed, and defendant did not argue that new hearings were necessary.

Judge ZACHARY concurs in the result only by separate opinion.

Appeal by defendant from judgments entered 15 October 2014 by Judge Paul L. Jones in Lenoir County Superior Court. Heard in the Court of Appeals 6 October 2015.

Attorney General Roy Cooper, by Assistant Attorney General Jason R. Rosser, for the State.

Meghan A. Jones for defendant-appellant.

BRYANT, Judge.

Where the State failed to meet the requirements of Rule 9(b), and where the State's evidence was insufficient to confer subject matter jurisdiction upon the trial court for the revocation of defendant's probation in Case Nos. 11 CRS 543–45, we vacate the judgments imposed in those cases. In Case Nos. 12 CRS 1214–19, we remand to the trial court for correction of clerical errors.

On 13 January 2009, defendant Martin Luther Peele was indicted for two counts of obtaining property by false pretenses in violation of N.C. Gen. Stat. § 14-100, a Class H felony. On 6 April 2009, defendant was indicted for thirty-one additional counts of obtaining property by false pretenses. In 2009, defendant was also charged with a Class 2 misdemeanor, fraudulent disposal of personal property on which there was a security interest, in violation of N.C. Gen. Stat. § 14-114. The charges of obtaining property by false pretenses arose from separate incidents occurring in 2007 and 2008. Defendant owned a business for the construction of metal buildings, and the charges alleged that in each case, defendant had received money to construct a building and then either failed to perform work or performed work that was defective.

On 24 February 2010, a jury found defendant guilty of two charges of obtaining property by false pretenses, and defendant pled guilty to the misdemeanor charge of fraudulent disposal of personal property. The court imposed consecutive sentences in Case Nos. 11 CRS 543–45. Defendant was sentenced in Case No. 11 CRS 543 to a suspended sentence of thirty days imprisonment and placed on supervised probation for eighteen months for fraudulent disposal of personal property. In Case Nos. 11 CRS 544 and 545, defendant was given a suspended sentence of six to eight months imprisonment, placed on supervised probation for forty-eight months, and ordered to pay restitution in the amount of $5,360.00.

On 1 March 2011, defendant entered pleas of guilty to twenty-seven charges of obtaining property by false pretenses and four charges of the misdemeanor offense of failing to perform work for which he had been paid, the latest of which occurred in April of 2007. Defendant's pleas were entered pursuant to a plea bargain under the terms of which he agreed to pay $45,276.47 as restitution to the victims of these offenses. The State agreed to dismiss other charges pending against defendant and to dismiss all charges arising from theses offenses that had been lodged against defendant's wife.

The thirty-one charges were consolidated into six cases for purposes of sentencing, and consecutive sentences of eight to ten months

imprisonment were imposed in each case. These sentences were suspended, and in each case defendant was placed on probation for sixty months. The following chart summarizes the judgments and the original terms of probation.

Judgment Date	File No.	Charge No./Nos.	Consecutive Sentences in 11 CRS 543–45	Original Term of Probation
10 February 2010	11 CR 543	09 CR 2992	30 Days	18 Months
24 February 2010	11 CRS 544	08 CRS 51479	6–8 Months	48 Months
24 February 2010	11 CRS 545	08 CRS 51481	6–8 Months	48 Months
			Consecutive Sentences in 12 CRS 1214–19	
1 March 2011	12 CRS 1214	08 CRS 55446, 55448, 55452, 55454, 55455, 55458, 55459, 55462	8–10 Months	60 Months
1 March 2011	12 CRS 1215	08 CRS 55463, 55466, 55467, 55470, 56978, 56981, 56982, 56985, 56986	8–10 Months	60 Months
1 March 2011	12 CRS 1216	08 CRS 56989, 56991, 56995, 56997	8–10 Months	60 Months
1 March 2011	12 CRS 1217	08 CRS 57000, 57001, 57005, 57007	8–10 Months	60 Months
1 March 2011	12 CRS 1218	08 CRS 57010, 57011, 57014	8–10 Months	60 Months
1 March 2011	12 CRS 1219	08 CRS 57015, 57309, 09 CRS 50785	8–10 Months	60 Months

On 7 August 2014, violation reports were filed in each of the nine cases discussed above—three cases from 2010 and six cases from 2011. All of the violation reports alleged that on 4 June 2014, defendant was convicted of obtaining property by false pretenses, in violation of the requirement that defendant commit no criminal offenses while on probation. On 15 October 2014, the trial court revoked defendant's probation in all nine cases and activated the prison sentences in each case. The trial court ordered the terms of imprisonment in Case Nos. 11 CRS

543–45 to be served consecutively, with these three consecutive sentences to be served concurrently with the six consecutive sentences activated in Case Nos. 12 CRS 1214–19. Defendant appealed to this Court from the judgments revoking his probation.

On appeal, defendant argues (1) that the trial court lacked subject matter jurisdiction to revoke his probation in Case Nos. 11 CRS 543–45 and (2) the trial court made clerical errors in Case Nos. 11 CRS 544–45 and 12 CRS 1214–19 requiring remand for correction of those errors.

I

Defendant first argues that the trial court lacked subject matter jurisdiction to revoke his probation in Case Nos. 11 CRS 543–45 because the State failed to prove that the violation reports were timely filed. We agree.

Defendant's Motion to Strike the State's Rule 9(b)(5) Supplement and All References to the Supplement in the State's Brief

[1] On 13 May 2015, defendant filed his appellant brief with this Court and served it on the State by email. On 12 June 2015, the State electronically filed its appellee brief and filed in person a Rule 9(b)(5) Supplement to the Printed Record on Appeal. On 18 June 2015, defendant filed a Motion to Strike the State's Rule 9(b)(5) Supplement and All References to the Supplement in the State's Brief. On 23 June 2015, the State filed a Response to defendant's Motion.

In his Motion to Strike, defendant argues that the State's 9(b)(5) supplement fails to satisfy Rule 9 as the documents the State seeks to present to this Court in its supplement cannot be properly included as they were not introduced at the 15 October 2014 probation violation hearing. We agree and, for the reasons stated herein, grant defendant's motion to strike.

Rule 9 of our Rules of Appellate Procedure governs the filing of the record on appeal. N.C. R. App. P. 9 (2015). In a criminal appeal, the record should contain all matters presented before the trial court, including

> copies of all other papers filed and statements of all other proceedings had in the trial courts which are necessary for an understanding of all issues presented on appeal, unless they appear in the verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2)[.]

Id. 9(a)(3)(i). Where the record on appeal is insufficient to answer the issues presented on appeal, the record may be supplemented by items allowed under Rule 9, so long as those items "could otherwise have been included pursuant to this Rule 9." *Id.* 9(b)(5)(a).

It is well-settled that this Court may "only consider the pleadings and filings before the trial court . . . ." *Twaddell v. Anderson*, 136 N.C. App. 56, 68, 523 S.E.2d 710, 719 (1999) (citation omitted). This Court has specifically rejected the State's attempt to supplement the Settled Record on Appeal with documents that were never presented to the trial court in order to prove that a defendant's probation was tolled. *See, e.g.*, *State v. Karmo*, No. COA12-1209, 2013 WL 4006648, *4–5 (N.C. Ct. App. Aug. 6, 2013) (unpublished).

In *Karmo*, an unpublished case but directly on point here, the State filed a supplement to the record along with its brief containing documents tending to show that the defendant had received various criminal convictions stemming from incidents which took place while the defendant was on probation. *Id.* This Court categorically found that it "lack[ed] authority to consider the information contained in the supplemental materials presented for [this Court's] consideration by the State" because "the record before [this Court] contain[ed] no indication that the documents contained in the supplement . . . were admitted into evidence at Defendant's revocation hearing." *Id.* Accordingly, this Court concluded that because

> nothing in the record developed before the trial court tend[ed] to show that Defendant committed any criminal offenses during, as compared to before or after, his initial probationary period. As a result, we have no choice but to conclude that *the State failed to demonstrate that the trial court had jurisdiction* to consider the revocation of Defendant's probation and the activation of Defendant's suspended sentence.

Id. at *3 (emphasis added).

Here, just like the State's supplement in *Karmo*, the State's Rule 9(b)(5) supplement was filed in order to submit to this Court certain documents which were not presented to the trial court which, had they been, would have conferred subject matter jurisdiction on the trial court to revoke defendant's probation in Case Nos. 11 CRS 543–45. But those documents were not introduced at the 15 October 2014 probation violation hearing in the trial court, even though it is the State's burden to establish jurisdiction in that court. *State v. Williams*, 230 N.C. App. 590,

595, 754 S.E.2d 826, 829 (2013); *State v. Moore*, 148 N.C. App. 568, 571, 559 S.E.2d 565, 566–67 (2002) ("The burden of perfecting the trial court's jurisdiction for a probation revocation hearing . . . lies squarely with the State."); *State v. Petersilie*, 334 N.C. 169, 175, 432 S.E.2d 832, 835 (1993) ("North Carolina requires the State to prove jurisdiction beyond a reasonable doubt in a criminal case").

The State argues that, because the documents included in the State's Rule 9(b)(5) Supplement were filed with the trial court in the case files of the former proceedings, and because they are necessary for an understanding of the issues presented on appeal, they are properly part of the record here. N.C. R. App. P. 9(a)(1)(j) (stating that the record on appeal shall contain "copies of all other papers filed and statements of all other proceedings had in the trial courts which are necessary for an understanding of all issues presented on appeal").

However, the North Carolina Supreme Court has previously concluded that this Court does not act beyond its discretion when it denies the State's motion to amend the record to include documents which would be "sufficient to confer jurisdiction" on the trial court, where the record otherwise before this Court, absent the proposed amendment, "affirmatively shows a lack of jurisdiction." *Petersilie*, 334 N.C. at 177–78, 432 S.E.2d at 836–37; *see also State v. Felmet*, 302 N.C. 173, 174, 176 273 S.E.2d 708, 710–11 (1981) (concluding that this Court did not abuse its discretion in denying defendant's motion to amend the record to include "the judgment of the district court which reflected defendant's appeal therefrom to the superior court" in order to show how the superior court obtained subject matter jurisdiction over the case).

Accordingly, we decline to invoke Rule 2 and allow a Rule 9(b)(5) supplement to function as the vehicle by which the State attempts to establish the trial court's jurisdiction where it failed to do so before.

Case No. 11 CRS 543

[2] We address defendant's argument that the trial court lacked subject matter jurisdiction to revoke his probation in Case No. 11 CRS 543. For reasons set forth below, we address Case Nos. 11 CRS 544 and 545 separately.

This Court reviews *de novo* the issue of whether a trial court had subject matter jurisdiction to revoke a defendant's probation. *State v. Satanek*, 190 N.C. App. 653, 656, 660 S.E.2d 623, 625 (2008) (citation omitted). "A court's jurisdiction to review a probationer's compliance with the terms of his probation is limited by statute." *Moore*, 148 N.C.

App. at 569–70, 559 S.E.2d at 566 (quoting *State v. Hicks*, 148 N.C. App. 203, 204–05, 557 S.E.2d 594, 595 (2001)). When a sentence has been suspended and a defendant has been placed on probation on certain named conditions, the trial court may, "*at any time during the period of probation*, require defendant to appear before it, inquire into alleged violations of the conditions, and if found to be true, place the suspended sentence into effect." *Id.*

However, "the State may not do so *after the expiration period of probation* except as provided in G.S. 15A-1344(f)." *Id.* "The burden of perfecting the trial court's jurisdiction for a probation revocation hearing after defendant's period of probation has expired lies squarely with the State." *Id.* at 571, 559 S.E.2d 566–67 (citations omitted). The trial court may revoke probation after the expiration of the probation period only if the State filed a written violation report with the clerk *prior* to the expiration of the probation period. N.C. Gen. Stat. § 15A-1344(f) (2015). For purposes of determining when a document is considered "filed," the file stamp date is controlling. "Filed" means the original document has been "received in the office where the document is to be filed." N.C. Gen. Stat. § 15A-101.1(7)(a) (2015).

The State bears the burden in criminal cases of "demonstrating beyond a reasonable doubt that a trial court has subject matter jurisdiction." *Williams*, 230 N.C. App. at 595, 754 S.E.2d at 829 (citing *Petersilie*, 334 N.C. at 175, 432 S.E.2d at 835). A "defendant may properly raise the issue of subject matter jurisdiction at any time, even for the first time on appeal." *Id.* (citation omitted). When the record "shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority." *Moore*, 148 N.C. App. at 570, 559 S.E.2d at 566 (quoting *Petersilie*, 334 N.C. at 175, 432 S.E.2d at 836).

The violation report in 11 CRS 543 was not filed until 13 August 2014, as reflected by the file stamp at the top of the first page of the report. In the judgment suspending sentence, the trial court ordered only 18 months of probation. There are no orders extending probation and no tolling provisions apply. The effective date for N.C. Gen. Stat. § 15A-1344(g) (2009) applies only to offenses committed on or after 1 December 2009. 2009 N.C. Sess. Law 2009-327, § 11(b). The previous tolling provision, N.C. Gen. Stat. § 15A-1344(d) (2007), was removed in 2009 for "hearings held on or after December 1, 2009." 2009 N.C. Sess. Law 2009-372, § 11(a); *see also* N.C. Gen. Stat. § 1344(g), *repealed by* 2011 N.C. Sess. Law 2011-62, § 3, eff. Dec. 1, 2011.

The probationary period in 11 CRS 543 ended on 9 August 2011, 18 months after probation began on 10 February 2010. Therefore, the violation report with a file stamp of "13 August 2014" was filed too late to confer jurisdiction on the trial court to revoke defendant's probation and activate the suspended sentence. *See* N.C.G.S. § 15A-1344(f); *Moore*, 148 N.C. App. at 569, 559 S.E.2d at 566.

As stated above, a Rule 9(b) supplement to the record on appeal can only contain documents presented to the trial court. *Twaddell*, 136 N.C. App. at 68, 523 S.E.2d at 719. As we have already established, the State's Rule 9(b)(5) supplement was filed in order to confer jurisdiction on the trial court, and the State otherwise failed to establish that the trial court had jurisdiction to consider the revocation of defendant's probation in Case No. 11 CRS 543.

The State alleges that the documents, filed as a Rule 9 supplement, had they been properly introduced in the trial court below and made part of the record here, would confer jurisdiction on the trial court to revoke defendant's probation in Case No. 11 CRS 543. However, because this Court denies the State's 9(b)(5) supplement to the record, and the State cannot establish that the trial court had jurisdiction to consider the revocation of defendant's probation in Case No. 11 CRS 543, we vacate the judgment entered thereon.

Case Nos. 11 CRS 544 and 545

Defendant also argues that the trial court lacked subject matter jurisdiction to revoke his probation in Case Nos. 11 CRS 544 and 545. We agree.

Defendant's probation cases under 11 CRS 544 and 545, for the same reasons discussed *supra* regarding Case No. 11 CRS 543, suffer from lack of jurisdiction. In the judgment suspending sentence, the trial court ordered 48 months of probation. There are no orders extending probation, and again, no tolling provisions apply in these cases. The probationary period ended on 23 February 2014—48 months after probation began on 24 February 2010. Accordingly, the violation reports filed on 13 August 2014 in both Case Nos. 11 CRS 544 and 545 were filed over five months after the expiration of the probationary period on 24 February 2014. Accordingly, the judgments entered in Case Nos. 11 CRS 544 and 545 are vacated.[1]

1. Because we vacate the judgments, we do not remand for correction of the clerical errors that were a part of those judgments.

II

[3] Defendant next argues that clerical errors were made in Case Nos. 12 CRS 1214–19, which require remand for correction. Defendant argues that the trial court marked boxes which indicated erroneously that, in the original judgments suspending sentence, the court found that the offenses involved assault, communicating threats, or another act defined in N.C. Gen. Stat. § 50B-1(a) and that defendant had a personal relationship, as defined by N.C. Gen. Stat. § 50-1(b), with the victim in Case Nos. 12 CRS 1214–19. We agree.

A clerical error is an error "resulting from a minor mistake or inadvertence, in writing or copying something on the record, and not from judicial reasoning or determination." *State v. Lark*, 198 N.C. App. 82, 95, 678 S.E.2d 693, 702–03 (2009) (quoting *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000)). "Clerical errors include mistakes such as inadvertently checking the wrong box on preprinted forms." *Rudder v. Rudder*, ___ N.C. App. ___, ___, 759 S.E.2d 321, 326 (2014) (citation omitted).

"When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth." *Lark*, 198 N.C. App. at 95, 678 S.E.2d at 702 (quoting *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008)). Further, where "the sentence imposed will not be affected by a recalculation of [a] [d]efendant's prior record points, it is not necessary that there be a new sentencing hearing." *State v. Everette*, ___ N.C. App. ___, ___, 764 S.E.2d 634, 639 (2014).

Here, on six of the judgments entered upon revocation of probation in 12 CRS 1214–19, the trial court marked boxes indicating that the underlying offense involved assault, communicating a threat, or an act defined in N.C.G.S. § 50B-1(a), and that the defendant had a personal relationship with the victim as defined by N.C.G.S. § 50B-1(b).

However, none of the original judgments suspending sentence support such findings. The respective boxes, denoted No. 10 on the preprinted forms (Form AOC-CR-603), for finding that "this is an offense involving assault or communicating a threat and that the defendant had a personal relationship as defined by G.S. 50B-1(b) with the victim" on the original judgments suspending sentence, all remain unmarked. It appears that the trial court "inadvertently" checked this box on these preprinted forms.

The reason that remand is appropriate in this case for the correction of clerical errors is because any subsequent inquiry into defendant's criminal record will erroneously reflect that underlying offenses "involved domestic violence" on eight separate judgments. *See* generally N.C. Gen. Stat. § 15A-1382.1 (2015).

Because the errors here do not affect the sentences imposed, and because failure to correct these errors could prejudice defendant, and defendant does not argue that new hearings are necessary, we remand this matter to the trial court for the correction of the aforementioned clerical errors.

VACATED IN PART, REMANDED IN PART.

Judge CALABRIA concurs.

Judge ZACHARY concurs in the result only by separate opinion.

Judge ZACHARY, concurring in result.

I concur with the holding that, in the absence of the information contained in the State's supplement to the record, we are unable to determine that the trial court had jurisdiction over the probation revocation proceedings challenged by defendant on appeal. Given the decision not to exercise our authority under N.C.R. App. P. Rule 2 in order to allow the State to supplement the record, the judgments revoking defendant's probation in these cases must be vacated. I write separately in order to express my view that it would have been preferable to invoke Rule 2, in order to reach the merits of the issue of the trial court's jurisdiction.

"The State bears the burden in criminal matters of demonstrating beyond a reasonable doubt that a trial court has subject matter jurisdiction." *State v. Williams*, 230 N.C. App. 590, 595, 754 S.E.2d 826, 829 (2013) (citing *State v. Petersilie*, 334 N.C. 169, 175, 432 S.E.2d 832, 835 (1993)), *disc. review denied*, 367 N.C. 298, 753 S.E.2d 670 (2014). In *Petersilie* our Supreme Court held that, although this Court had not erred by denying the State's motion to amend the record to add the documents that established subject matter jurisdiction, the better approach is to grant such a motion:

> In [*State v.*] *Felmet*, [302 N.C. 173, 273 S.E.2d 708 (1981),] the defendant moved for leave to amend the record to include "the judgment of the district court which reflected

> defendant's appeal therefrom to the superior court" to show how the superior court obtained subject matter jurisdiction over his case. The Court of Appeals denied the motion. We concluded that the denial was a decision within the discretion of the Court of Appeals[.] . . . Nevertheless, we held the record should be amended to reflect subject matter jurisdiction so that we could reach the substantive issue of the appeal. In so holding, we stated, "[this] is the better reasoned approach and avoids undue emphasis on procedural niceties." While we find no abuse of discretion on the part of the Court of Appeals in denying the State's motion to amend, we elect as we did in *Felmet* to allow the State leave to amend. When the record is amended to add the presentment, it is clear the superior court had jurisdiction[.]

Petersilie, 334 N.C. at 177-78, 432 S.E.2d at 837 (quoting *State v. Felmet*, 302 N.C. 173, 174, 176, 273 S.E.2d 708, 710-11 (1981)).

My belief that it would have been preferable to invoke Rule 2 in this case in order to reach the merits of this issue is based in part on the longstanding rule that the " 'issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court *sua sponte*.' " *State v. Kostick*, __ N.C. App. __, __, 755 S.E.2d 411, 418 (quoting *State v. Webber*, 190 N.C. App. 649, 650, 660 S.E.2d 621, 622 (2008)), *disc. review denied*, 367 N.C. 508, 758 S.E.2d 872 (2014). When the issue of subject matter jurisdiction is determined for the first time on appeal then, by definition, the issue was not litigated at the trial level. It is inconsistent to, on one hand, allow inquiry into the existence of jurisdiction for the first time at the appellate level, but on the other hand to restrict our analysis to consideration of documents presented at the trial level, where the issue was not even raised. However, given that we have not allowed the State to supplement the record, I concur in the result reached in this opinion.

STATE OF NORTH CAROLINA
v.
DAVID DWAYNE SMITH, DEFENDANT

No. COA15-305

Filed 1 March 2016

1. Appeal and Error—oral notice of appeal—no statement of appeal from judgment—petition for certiorari

A petition for certiorari was granted where defendant gave oral notice of appeal but defendant's trial counsel did not state that he was appealing from the judgment of conviction.

2. Search and Seizure—knock and talk—not a Fourth Amendment search

Detectives did not violate the Fourth Amendment by entering defendant's property by his driveway to ask questions about the previous day's shooting. Law enforcement officers may approach a front door to conduct "knock and talk" investigations that do not rise to the level of a Fourth Amendment search.

3. Search and Seizure—implied license to approach home—not nullified—"no trespassing" sign

A "No Trespassing" sign on the gate to defendant's driveway did not, by itself, remove the implied license to approach his home.

4. Search and Seizure—knock and talk—no purpose beyond basic questioning

A "knock and talk" encounter with defendant at his home was lawful where the detectives' actions did not reflect any purpose beyond basic questioning.

5. Search and Seizure—curtilage—driveway

Detectives did not deviate from the area where their presence was lawful in order to talk with defendant. The driveway served as an access route to the front door, an area where they were lawfully able to approach for a "knock and talk."

Appeal by Defendant by writ of certiorari from judgment entered 19 August 2014 by Judge Marvin P. Pope in Buncombe County Superior Court. Heard in the Court of Appeals 23 September 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Richard E. Slipsky, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Jon H. Hunt, for Defendant-Appellant.

INMAN, Judge.

A sign on a rural highway advertising pony rides generally prompts nostalgic thoughts for passing motorists. But a grandfather who noticed such a sign near Arden, North Carolina, found his interest rewarded with gunfire, followed by a series of events giving rise to this appeal.

Defendant David Dwayne Smith ("Defendant"), who resided on the Double "S" Ranch, was convicted of firing into the grandfather's occupied vehicle and other related weapons offenses. He contends that law enforcement officers' entrance into his driveway to investigate the shooting violated his Fourth Amendment protections against unreasonable searches and seizures, and that the trial court therefore erred in denying his motion to suppress evidence gathered as a result of that investigation. After careful review, we affirm the trial court's ruling because at the time of the investigation, Defendant had not revoked the implied license for visitors to approach his home, and the officers' actions did not exceed the scope of a lawful "knock and talk."

Factual and Procedural History

On the afternoon of 30 July 2013, Danny Wilson ("Mr. Wilson") drove his two adult children and a family friend to 2516 Hendersonville Road in Arden, where he had seen a sign advertising "pony rides," to inquire about a ride for his grandson. The pony ride sign, which listed a phone number, was located near the edge of Hendersonville Road and could be seen from the road. Defendant and his wife, Brenda Smith ("Mrs. Smith"), resided at that address. The property was known as the Double "S" Ranch.[1]

A gate consisting of a piece of wire stock fencing separated Defendant's driveway and Hendersonville Road. Mr. Wilson and his passengers ("the Wilsons") observed a "No Trespassing" sign affixed to the gate. Mr. Wilson pulled off to the side of Hendersonville Road, just onto Defendant's driveway but outside the gate, and dialed the phone number listed on the sign.

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1. Another sign near the pony rides sign and visible from the highway was labeled "Double 'S' Ranch" and advertised "Riding Lessons, Lead-Line Rides and Temp[orary] Boarding." That sign listed the same phone number as the pony rides sign. Defendant owns the property jointly with his wife and other members of her family.

While Mr. Wilson placed the call, the passengers in his car heard a "pop" or "thump" noise. They observed a white male approximately 100 yards away from the road, holding what appeared to be a rifle, which they believe the male fired. The Wilsons left the premises and drove to a store to shop. When they returned to the car, they noticed a flat or nearly flat tire, so they drove to a tire store. Shortly thereafter, while the Wilsons were in a restaurant, the manager of the tire store came and showed them a small-caliber bullet that had been found in the flat tire during the repair. The tire store manager gave Mr. Wilson the bullet. Mr. Wilson then contacted the Asheville Police Department, which referred the matter to the Buncombe County Sheriff's Office.

The following day, 31 July 2013, Buncombe County Detectives Walt Thrower ("Detective Thrower") and Benjamin McKay ("Detective McKay") (collectively "the detectives") interviewed the Wilsons at Mr. Wilson's home. In separate interviews, each of the four witnesses gave the same account of the previous day's events. The detectives then went to the tire shop, where they interviewed the manager. Based on these interviews, the detectives drove to Defendant's property.

When they arrived at Defendant's property, Detective Thrower saw the pony ride sign and called the number listed to no avail. The gate was open. The detectives did not recall observing the "No Trespassing" sign the passengers had reported seeing the previous day.

The detectives, who were armed with pistols, put on bulletproof vests bearing the word "Sheriff" over their plain clothes and called for a uniformed deputy in a marked patrol car to accompany them onto the property. Once the uniformed deputy arrived, both the detectives' car and the marked patrol car drove through the open gate and onto the driveway leading to Defendant's residence. The detectives parked in a parking area beside another vehicle, which was later identified as Defendant's, but they stayed in their car because a large dog was running around. The uniformed deputy remained in his patrol car behind the detectives' car.

Defendant came out of the house, which was visible from the driveway, and spoke with the detectives, who at that time exited their vehicle and remained in the driveway. During this initial encounter, Defendant denied having any knowledge of a shooting on his property the previous day. When asked what he had been doing the day before, Defendant invited the detectives and the deputy to see some animal pens he was working on behind the house. When they returned to the driveway, the detectives asked Defendant if he owned any guns. Defendant told them

he owned an "air soft" gun, a non-lethal weapon that shoots plastic pellets. He denied owning a rifle.

Shortly thereafter, Mrs. Smith walked out of the house and spoke to Detective McKay. She told him that there was a .22 caliber rifle inside the residence. Detective Thrower asked Defendant for permission to search the residence for the rifle; Defendant gave his verbal consent. Subsequently, Detective Thrower drafted a handwritten consent form, which he asked Mrs. Smith to sign. Mrs. Smith initially expressed hesitation and asked whether she and Defendant should speak to a lawyer, but after conferring separately with Defendant, she signed the consent form.

According to Detective McKay, during the time when Detective Thrower was drafting the handwritten consent and then speaking separately with Mrs. Smith, Detective McKay told Defendant, "this [incident] could have been a lot worse because nobody got hurt," to which Defendant replied, "[the passengers] didn't get hurt because I didn't mean them to get hurt. I hit what I shot at." While still in the driveway, Defendant wrote and signed a statement saying he "aimed at the right front tire of [Mr. Wilson's] truck and struck it."

Detective McKay searched Defendant's house and found a .22 caliber rifle with a scope as well as another shotgun. Detective McKay seized the rifle and then prepared a handwritten receipt, which Defendant signed. The detectives and uniformed deputy then left Defendant's home. As Detective Thrower was getting into the car, Defendant commented that Detective Thrower's bulletproof vest would "only stop[] up to a .45 [caliber bullet] and that would not do [Detective Thrower] any good." At this time, Defendant was not arrested, confined, advised of his rights, or charged with a crime. The detectives were present on Defendant's property for a total of approximately 40 to 45 minutes.

After leaving Defendant's residence, Detective Thrower ran a criminal background check on Defendant that revealed prior felony convictions from Texas. Based on Defendant's convicted felon status and the detectives' interaction with him, the detectives applied for a search warrant to retrieve the other gun that Detective McKay had observed in Defendant's home. The detectives also obtained an arrest warrant charging Defendant with various offenses including firing a .22 caliber rifle into an occupied vehicle in operation and unlawful firearm possession. Based on Defendant's criminal history, known possession of a firearm, and his comment to Detective Thrower about the bulletproof vest (which was perceived as a threat), the detectives' supervisors recommended that a SWAT team accompany them to Defendant's home to execute the warrants.

On 1 August 2013, the SWAT team arrived at Defendant's residence. The driveway gate was closed. Instead of a "No Trespassing" sign like the one the Wilsons described seeing on 30 July 2013, there was a sign on the gate warning, "Trespassers will be shot!!! Survivors will be shot again!!!" The SWAT team drove through the gate in an armored vehicle. While searching Defendant's residence, officers found multiple firearms including a shotgun, a Russian style sniper rifle, and a black powder muzzle-loading rifle. At the time the officers were executing the search warrant, Defendant was arrested by different officers away from his residence.

On 4 November 2013, Defendant was indicted for the following offenses: discharging a weapon into an occupied vehicle in operation; possession of a firearm by felon (three counts); and having attained the status of a habitual felon (three counts). On 23 June 2014, Defendant filed in Buncombe County Superior Court a motion to suppress all evidence obtained during the detectives' first visit to the property and the evidence procured by the search warrant the following day. Judge William H. Coward denied Defendant's motion to suppress.

On 19 August 2014, before Judge Marvin P. Pope Jr., Defendant pled guilty to the charged offenses while preserving his right to appeal the denial of the suppression motion. Defendant was sentenced, as a prior record level III offender, to an active term of imprisonment lasting from 96 months to 128 months. Defendant gave notice of appeal in open court.

Analysis

I. Appellate Jurisdiction

[1] As an initial matter, we must address the issue of whether appellate jurisdiction exists over Defendant's appeal. Rule 4 of the North Carolina Rules of Appellate Procedure provides that a defendant may appeal a judgment or order rendered in a criminal action by giving oral notice of appeal at trial. N.C. R. App. P. 4(a).

On 20 August, the day after Defendant pled guilty to the charged offenses, Defendant's trial counsel gave oral notice of appeal, stating that Defendant was "giving notice of appeal in court to the North Carolina Court of Appeals of the denial of the suppression motion." Because Defendant's trial counsel did not state that Defendant was appealing from the judgment of conviction, but only from the suppression motion, the notice of appeal was deficient. *See State v. Miller*, 205 N.C. App. 724, 725, 696 S.E.2d 542, 542 (2010) ("Defendant has failed to appeal from the judgment of conviction and our Court does not have jurisdiction to

consider Defendant's appeal."). Recognizing the deficiency in his notice of appeal, Defendant filed a petition for writ of certiorari asking this Court to review the 20 August 2014 judgment of conviction. The State concedes that "it is clear that [D]efendant was attempting to notice his appeal of the judgment." In light of the fact Defendant intended to appeal the judgment, we exercise our discretion and allow the petition for writ of certiorari. *See* N.C. R. App. P. 21(a)(1); *see also State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320 (2005) ("While this Court cannot hear defendant's direct appeal [for failure to properly give notice of appeal], it does have the discretion to consider the matter by granting a petition for writ of *certiorari*.").

II. Motion to Suppress

[2] In its order denying Defendant's motion to suppress, the trial court made the following pertinent conclusions:

> 14. After considering and weighing these factors, this court concludes that the curtilage of Defendant's house did not extend to the gate.
>
> 15. The Court further concludes that the curtilage did not extend into the driveway, where the detectives initiated their investigations, and generally where the interactions of the parties occurred.
>
> 16. Even if the curtilage can be extended out into the open driveway area, the Court concludes that the actions of the detectives and the deputy were the equivalent of a "knock and talk" encounter and did not violate the Fourth Amendment.

Defendant challenges the trial court's conclusion that "the actions of the detectives and deputy were the equivalent of a 'knock and talk' encounter and did not violate the Fourth Amendment." Specifically, Defendant contends the investigation was unlawful because the detectives had no implied license to enter Defendant's property and because the detectives exceeded the general inquiry within the limits of a lawful "knock and talk." Defendant also challenges the trial court's conclusion that "the curtilage did not extend into the driveway, where the detectives initiated their investigations, and generally where the interactions of the parties occurred." We reject Defendant's arguments and hold that the detectives did not violate the Fourth Amendment in entering Defendant's property by way of his driveway to ask questions about the previous day's shooting.

In our review of trial court orders addressing motions to suppress,

> the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. This Court must not disturb the trial court's conclusions if they are supported by the trial court's factual findings. However, the trial court's conclusions of law are fully reviewable on appeal.

State v. Harwood, 221 N.C. App. 451, 454–55, 727 S.E.2d 891, 895–96 (2012) (internal quotation marks and citations omitted).

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "The Fourth Amendment indicates with some precision the places and things encompassed by its protections: persons, houses, papers, and effects." *Florida v. Jardines*, 569 U.S. __, __,185 L. Ed. 2d 495, 501 (2013) (internal quotation marks and citations omitted). "At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511, 5 L. Ed. 2d 734, 739 (1961).

The United States Supreme Court has articulated two tests for assessing a search under the Fourth Amendment: the reasonable expectation of privacy test based on Justice Harlan's concurrence in *Katz v. United States*, 389 U.S. 347, 360, 19 L. Ed. 2d 576, 587 (1967), and the "trespassory test" employed in *United States v. Jones*, 565 U.S. __, __,181 L. Ed. 2d 911, 920–21 (2012), and *Jardines*, 569 U.S. at __, 185 L. Ed. 2d at 503–04.

In *Katz v. United States*, 389 U.S. 347, 351, 19 L. Ed. 2d 576, the Supreme Court held that the government conduced an unreasonable Fourth Amendment search by placing an electronic listening device outside of a public telephone booth. "As Justice Harlan's oft-quoted concurrence [in *Katz*] described it, a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v. United States*, 533 U.S. 27, 33, 150 L. Ed. 2d 94, 101 (2001).

In *Jones*, the Supreme Court held that the government's installation of a GPS device on a target's vehicle and use of the GPS device to monitor the vehicle's movements constituted a Fourth Amendment search. 565 U.S. at __, 181 L. Ed. 2d at 919. Noting that "our Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter

half of the 20th century[,]" *id.* at __, 181 L. Ed. 2d. at 918, the *Jones* Court held that "the *Katz* reasonable-expectation-of-privacy test has been added to, not substituted [by], the common-law trespassory test." *Id.* at __, 181 L. Ed. 2d at 921. In *Jardines*, 569 U.S. at __, 185 L. Ed. 2d at 502, the Supreme Court held that law enforcement officers' use of a drug-sniffing dog on the front porch of a home to investigate a tip that marijuana was being grown inside was a physical intrusion of the curtilage which constituted a "search" for Fourth Amendment purposes. The Supreme Court explained that officers "gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner." *Id.* at __, 185 L. Ed. 2d at 502. The Supreme Court held that there is an implied license for visitors to "approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Id.* A police officer, like any other private citizen, may accept this implied invitation and approach the home by the front path. *Id.*

Accordingly, in North Carolina, law enforcement officers may approach a front door to conduct "knock and talk" investigations that do not rise to the level of a Fourth Amendment search. *See State v. Tripp*, 52 N.C. App. 244, 249, 278 S.E.2d 592, 596 (1981) ("Law enforcement officers have the right to approach a person's residence to inquire as to whether the person is willing to answer questions.") (internal citations omitted); *see also State v. Church*, 110 N.C. App. 569, 573–74, 430 S.E.2d 462, 465 (1993) ("[W]hen officers enter private property for the purpose of a general inquiry or interview, their presence is proper and lawful . . . . [O]fficers are entitled to go to a door to inquire about a matter; they are not trespassers under these circumstances.") (internal quotation marks and citation omitted).

A. Implied License

[3] Defendant argues that the "No Trespassing" sign on his gate "expressly removed" the implied license to approach his home, and thus "any information gathered by the officers following their warrantless entry onto the property should [have been] suppressed." We disagree because the sign alone, particularly in the context of other relevant facts, was insufficient to revoke the implied license to approach.

As recognized by *Jardines*, the implied license to approach a home is not absolute. *State v. Grice*, 367 N.C. 753, 762, 767 S.E.2d 312, 319 (2015) (citing *Jardines*, 569 U.S. at __, 185 L. Ed. 2d at 502). Provided that the homeowner displays "clear demonstrations" of his intent, the license to approach the home may be limited or rescinded entirely. *Id.*

The dispositive question is whether, at the time of the approach by law enforcement officers, Defendant had made the requisite "clear demonstration" that the license to enter his property has been rescinded. *Id.*

Prior to *Jardines*, this Court held that the presence of a "No Trespassing" sign on its own is not dispositive for Fourth Amendment analysis. *State v. Pasour*, 223 N.C. App. 175, 178–79, 741 S.E.2d 323, 326 (2012) ("Further, while not dispositive, a homeowner's intent to keep others out . . . may be demonstrated by the presence of 'no trespassing' signs."). Moreover, while a few jurisdictions in the wake of *Jardines* have reached mixed results in interpreting when and how revocation may occur, we are not aware of any court that has ruled that a sign alone was sufficient to revoke the implied license to approach. *See*, *e.g.*, *United States v. Bearden*, 780 F.3d 887, 893–94 (8th Cir. 2015) ("knock and talk" upheld where officers entered property through open driveway gate marked with "No Trespassing" signs); *United States v. Denim*, No. 2:13-CR-63, 2013 WL 4591469, at *2–6 (E.D. Tenn. Aug. 28, 2013) (six "No Trespassing" signs not sufficient to revoke implied license). Courts in other jurisdictions have ruled that the implied invitation to approach was revoked by homeowners who sought refuge behind a large, imposing fence and made clear by either verbal or posted instructions that visitors were not welcome. *See Bainter v. State*, 135 So.3d 517, 519 (Fla. 5th DCA 2014) (license revoked by presence of six foot chain link gate within barbed wire fence, accompanied by "No Trespassing" signs); *Brown v. State*, 152 So.3d 619, 622–24 (Fla. 3d DCA 2014) (license revoked by presence of two concentric chain link fences around property, "No Trespassing" signs on outer fence, and verbal request to leave by owner); *Robinson v. State*, 164 So.3d 742, 742–44 (Fla. 2d DCA 2015) (license revoked by closed chain-link fence bearing both "No Trespassing" and "Beware of Dog" signs).

Here, it is not established that Defendant consistently displayed a "No Trespassing" sign on his property. While the trial court found that there was indeed such a sign present on 30 July, the trial court did not find that the sign was present on 31 July, the day law enforcement officers first visited the property.

Moreover, there is no evidence that Defendant took consistent steps to physically prevent visitors from entering the property. The "gate" consisted of wire mesh stretched across two poles on either side of the driveway. At no time during the initial encounter with the Wilsons or the investigation into the shooting did this gate bear a lock or any other form of locking mechanism. While the gate was closed when the Wilsons approached on 30 July, it was open when the detectives arrived on 31 July.

Finally, Defendant's conduct upon the detectives' arrival belied any notion that their approach was unwelcome. When the detectives and the uniformed deputy entered his driveway, Defendant emerged from his home and "greeted the detectives and deputy," and after an initial conversation about the shooting incident, Defendant "voluntarily led the detectives and the deputy around to the rear of the residence" where they discussed Defendant's work (building animal pens), the weapons he owned (putatively an "air-soft" gun), and his livestock. Thus, rather than avoiding the detectives, which he was entitled to do, or requesting that they leave his property, Defendant engaged them in what the record reflects was a calm, civil discussion. Defendant's actions therefore did not reflect a "clear demonstration" of an intent to revoke the implied license to approach.

B. Scope and Purpose of "Knock and Talk"

[4] Defendant contends the "knock and talk" was not lawful because the detectives' actions exceeded the scope of a general inquiry. We disagree.

Generally, "[i]t is well established that entrance by law enforcement officers onto private property for the purpose of a general inquiry or interview is proper." *State v. Gentile*, __ N.C. App. __, __,766 S.E.2d 349, 353 (2014). "[T]he scope of a license is limited not only to a particular area but also to a specific purpose." *Jardines*, 569 U.S. at __, 185 L. Ed. 2d at 499.

On 31 July, after speaking with the Wilsons and the manager of the tire store, the detectives entered Defendant's property to inquire about the reported shooting the prior day. Because they were investigating a shooting, the detectives wore bulletproof vests and were accompanied by a marked patrol car and uniformed deputy. The detectives and deputy drove in daylight through Defendant's open gate and onto his driveway. The detectives' vests, worn over their clothing, plainly displayed the word "Sheriff" and they made no attempt to conceal the fact that they were law enforcement officers. In fact, when Defendant came out of his house and greeted the detectives in the driveway, they identified themselves and showed Defendant their badges.

Unlike the facts of *Jardines*, 569 U.S. at __, 185 L. Ed. 2d at 502–03, in which officers introduced a trained police dog to explore the area beyond the home without the resident's consent, the detectives' actions in the present case did not reflect any purpose beyond basic questioning. The detectives only departed from Defendant's driveway and ventured further onto his property after Defendant expressly invited them to the

rear of his house to see his animal pens. The detectives entered the home only after Mrs. Smith stated that there was, in fact, a rifle in the home and after receiving consent from both Defendant and Mrs. Smith. Defendant did not request that the officers leave his property at any time. Moreover, the detectives' questions regarding whether there were guns in Defendant's home were both reasonable and germane to the purpose of the visit, which was to make a general inquiry about a reported shooting on the property.

C. Curtilage

[5] Defendant challenges the trial court's conclusion that "the curtilage did not extend into the driveway, where the detectives initiated their investigations, and generally where the interactions of the parties occurred." Defendant contends that "[h]ad the trial court properly concluded that the areas immediately around [Defendant's] home were within the curtilage, [Defendant] would have been afforded the Fourth Amendment protections which were his due. The detectives' unlawful entry into and through [Defendant's] curtilage would have, therefore, violated the Fourth Amendment." We disagree.

This issue relates to the expectation-of-privacy theory of Fourth Amendment jurisprudence. "Because an individual ordinarily possesses the highest expectation of privacy within the curtilage of his home, that area typically is afforded the most stringent Fourth Amendment protection." *State v. Lupek*, 214 N.C. App. 146, 151, 712 S.E.2d 915, 919 (2011) (internal quotation marks and citations omitted). "[T]he curtilage is the area to which extends the intimate activity associated with the sanctity of a man's home and the privacies of life, and therefore has been considered part of home itself for Fourth Amendment purposes." *Oliver v. United States*, 466 U.S. 170, 180, 80 L. Ed. 2d 214, 225 (1984) (internal citation and quotation marks omitted).[2] However, our Court has held:

> [N]o search of the curtilage occurs when an officer is in a place where the public is allowed to be, such as at the front door of a house. It is well established that entrance by law enforcement officers onto private property for the purpose of a general inquiry or interview is proper.

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2. The protection afforded to curtilage under the privacy interest of Fourth Amendment is determined by looking at four factors: "[1] the proximity of the area claimed to be curtilage to the home, [2] whether the area is included within an enclosure surrounding the home, [3] the nature of the uses to which the area is put, and [4] the steps taken by the resident to protect the area from observation by people passing by." *United States v. Dunn*, 480 U.S. 294, 301, 94 L. Ed. 2d 326, 334–35 (1987).

Gentile, __ N.C. App. at __, 766 S.E.2d at 353 (internal quotation marks and citations omitted).

Here, the trial court concluded that, "[e]ven if the curtilage can be extended out into the open driveway area . . . the actions of the detectives and deputy were the equivalent of a 'knock and talk' encounter and did not violate the Fourth Amendment." The trial court found that "[t]he Smith property is traversed by a private, unpaved driveway off of Hendersonville Road, which leads to the 'Smith House.'" The driveway served as an access route to the front door, an area detectives were lawfully able to approach to conduct a "knock and talk." *See Grice*, 367 N.C. at 761, 767 S.E.2d at 318 ("The officers in this case were, by the custom and tradition of our society, implicitly invited into the curtilage to approach the home."). By entering the gate and driving down the driveway, the detectives and deputy did not deviate from the area where their presence was lawful, and thus, did not violate the Fourth Amendment.

Conclusion

Because law enforcement officers did not violate Defendant's rights protected by the Fourth Amendment, we affirm the trial court's order denying the motion to suppress.

AFFIRMED.

Judges CALABRIA and STROUD concur.

CONNIE YERBY, Plaintiff, Employee
v.
NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY/DIVISION OF JUVENILE JUSTICE, Employer; CORVEL CORPORATION (Third-Party Administrator), Defendant

No. COA15-620

Filed 1 March 2016

1. Appeal and Error—mandate—properly followed

The Industrial Commission correctly followed the Court of Appeals mandate on remand and applied the proper legal standard in a case involving an injured juvenile justice officer.

2. Police Officers—injured—suitable duties—phrase borrowed from Workers' Compensation

The Industrial Commission did not err on remand of a case involving an injured juvenile justice officer where the Industrial Commission used a phrase borrowed from the Workers' Compensation statute but did not cite the Workers' Compensation Act in its analysis and nothing suggested that the Commission applied the Workers' Compensation Act in this case. There is no authority requiring that the Commission use exclusively original prose.

3. Police Officers—injured—suitable work duties—with officer's capability but dangerous

The Industrial Commission's analysis in a case involving an injured juvenile justice officer did not conflict with its analysis in *Dobson v. N.C. Department of Public Safety*, I.C. No W90912 (June 4, 2014). That case established that work duties that violate a physician's restriction may not be assigned; this case involved work duties that the officer was medically capable of performing under normal circumstances but that could devolve into violence.

Appeal by defendant from opinion and award filed 10 March 2015 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 November 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Sharon Patrick-Wilson, for defendant.

Kellum Law Firm, by J. Kevin Jones, for plaintiff.

DIETZ, Judge.

When a law enforcement officer employed by the State is injured in the line of duty, state law provides that the officer will continue to be paid her full salary even if she can no longer perform her regular job duties. But this law also provides that, if the officer "refuses to perform any duties to which the person may be properly assigned," the applicable state agency may cease paying the officer "as long as the refusal continues." N.C. Gen. Stat. § 143-166.19.

Plaintiff Connie Yerby was injured while working as a juvenile justice officer with the North Carolina Department of Public Safety. Roughly a month after the injury, her doctor authorized her to return to work on the condition that she not perform any duties requiring her to lift her right arm. DPS assigned Yerby to a "light-duty" role at a juvenile center that occasionally would place her in close proximity to violent juvenile offenders. Yerby refused this role because, in light of her doctor's restriction on the use of her arm, she was concerned that she could not adequately defend herself from a violent attack. DPS then ceased paying her salary.

Yerby challenged DPS's decision in the Industrial Commission, which reinstated her salary continuation because the light-duty role offered by DPS was "not suitable" under N.C. Gen. Stat. §§ 97-29 and 97-32. This Court reversed, holding that the Industrial Commission improperly applied the "suitable employment" analysis from the Workers' Compensation Act instead of the "duties to which the person may be properly assigned" standard from N.C. Gen. Stat. § 143-166.19. *Yerby v. N.C. Dep't of Pub. Safety*, ___ N.C. App. ___, 754 S.E.2d 209, 211 (2014).

On remand, the Industrial Commission again reinstated Yerby's salary continuation, this time concluding that, because her work restriction would render her "unable to adequately defend herself from students, who were often violent juvenile offenders," the duties proposed by DPS were not duties to which Yerby may be properly assigned.

DPS again appealed, this time arguing that the Industrial Commission's analysis violated this Court's mandate from *Yerby I* and again applied the wrong legal standard. For the reasons discussed below, we hold that the Industrial Commission engaged in the proper analysis to determine whether the proposed work duties were duties to which the officer may be properly assigned. Accordingly, we reject DPS's arguments and affirm the Commission's opinion and award.

Facts and Procedural History

The North Carolina Department of Public Safety has employed Plaintiff Connie Yerby as a juvenile justice officer and youth monitor since 2006. Yerby's role required her to monitor students in a juvenile facility—many of whom are violent offenders. Although Yerby was never assaulted by a student at work, she came "close to it." Her job therefore required her to be able to physically restrain a violent juvenile offender if necessary.

On 5 December 2011, Yerby fell at work and injured her head, neck, shoulder, back, and right arm. DPS began paying salary continuation benefits under N.C. Gen. Stat. § 143-166.16.

On 11 January 2012, DPS referred Yerby to Dr. William de Araujo, who diagnosed Yerby with a right rotator cuff strain as well as cervical and thoracic strains. Dr. Araujo permitted Yerby to return to light-duty work, provided that she perform no lifting with her right arm.

DPS requested that Yerby return to work on 23 January 2012 and offered her a "light-duty" role that involved supervising, monitoring, and conducting bed checks of students in the housing units and performing housing unit inspections. In this role, Yerby was not to be the first staff member to enter a juvenile's housing unit, and she was not to restrain students or perform any lifting with her right arm.

Yerby did not return to work as requested by DPS due to her concerns that her injuries would limit her ability to defend herself from a possible attack by a violent juvenile resident. On 10 February 2012, DPS notified Yerby that it was terminating her salary continuation payments as of 23 January 2012 because she failed to return to work as requested.

On 10 February 2012, Yerby responded that she would return to work on the conditions that she would not have to work alone, would not have to enter the students' rooms, and would not have to be in direct contact with the students. DPS denied Yerby's requested conditions.

On 5 March 2012, Yerby filed an Industrial Form 33 Request for Hearing in order to object to the termination of her salary continuation. At the hearing, Yerby explained that she refused DPS's proposed light-duty role because she would be unable to defend herself from a juvenile attack due to her injuries. A vocational rehabilitation expert also testified that the light-duty role would create a "constant element of danger due to the chance of being put in direct contact with students." This expert explained that, even though Yerby would not be required to

restrain a student in this role, she would not be immune from a student attack and could not properly defend herself if such an attack occurred.

The Deputy Industrial Commissioner concluded that DPS wrongfully terminated Yerby's salary continuation and that Yerby was entitled to the reinstatement of her salary from 23 January 2012 through 9 June 2012, the date she ultimately returned to a light-duty role at DPS. DPS appealed to the Full Industrial Commission, which concluded that Yerby was entitled to reinstatement of her salary continuation because the light-duty role offered by DPS was "not suitable" under N.C. Gen. Stat. §§ 97-29 and 97-32.

DPS then appealed to this Court. We reversed, holding that the Industrial Commission improperly applied the "suitable employment" standard under N.C. Gen. Stat. §§ 97-29 and 97-30 rather than the "duties to which the person may be properly assigned" standard under N.C. Gen. Stat. § 143-166.19. *Yerby v. N.C. Dep't of Pub. Safety*, ___ N.C. App. ___, 754 S.E.2d 209, 211 (2014). We remanded and directed the Commission "to apply the proper legal standard."

On remand, the Industrial Commission again concluded that Yerby was entitled to salary continuation benefits from the date of her injury to 9 June 2012. But this time, the Commission reasoned that the duties involved in DPS's proposed light-duty role were not "duties to which [s]he may be properly assigned[.]" The Commission explained that the duties proposed by DPS put Yerby at a "heightened risk of harm" because her injuries left her unable to "adequately defend herself from students, who were often violent juvenile offenders." DPS timely appealed from the Full Commission's amended opinion and award.

Analysis

Our review of an opinion and award from the Industrial Commission is limited to "whether the evidence presented before the Commission supports its factual findings, and whether those findings support the Commission's conclusions of law in its opinion." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

I. Compliance with this Court's mandate

[1] DPS first argues that the Commission failed to follow this Court's "remand directive" in its amended opinion and award. Specifically, DPS contends that the Industrial Commission impermissibly "applied an arbitrary and case specific standard" to determine whether the duties proposed by DPS were duties to which Yerby may be properly assigned. We disagree.

The Industrial Commission followed this Court's mandate and applied the proper legal standard as directed: it cited N.C. Gen. Stat. § 143-166.19 (the applicable statute) and quoted the specific statutory language we instructed the Commission to apply ("duties to which she may be properly assigned"). The Commission found that the duties DPS sought to assign "would place Plaintiff at a heightened risk of harm due to her physical restriction" because she "would be unable to adequately defend herself from students, who were often violent juvenile offenders." Based on this finding, the Industrial Commission reinstated Yerby's salary continuation because the duties DPS attempted to impose on Yerby were not ones "to which she may be properly assigned." This is precisely the sort of analysis that should be done by the Commission in a § 143-166.19 dispute, and it is what we expected when we remanded this case. Accordingly, we reject DPS's argument that the Commission ignored this Court's mandate.

II. Use of terms also used in the Workers' Compensation Act

[2] DPS next argues that the Industrial Commission wrongly applied the "suitable employment" standard from the Workers' Compensation Act—the same error that caused this Court to reverse and remand in *Yerby I*—because the Commission's analysis uses language from the "suitable employment" provisions of the Workers' Compensation Act. We disagree.

To be sure, the Commission's analysis used the phrase "physical restrictions and limitations," a phrase that appears in the "suitable employment" statute in the Workers' Compensation Act. But the Commission did not cite the Workers' Compensation Act in its analysis, and nothing suggests the Commission was applying the "suitable employment" standard from the Act in this case. Rather, the Commission appears simply to have borrowed language used in the Workers' Compensation Act to accurately describe Yerby's factual situation. This is not reversible error—we are unaware of any authority that requires the Industrial Commission to employ exclusively original prose in its opinions.[1]

III. Prior decisions from the Industrial Commission

[3] Finally, DPS argues that the Industrial Commission's analysis in this case conflicts with its analysis in *Dobson v. N.C. Department of Public*

1. The same is true for the Commission's use of the term "heightened risk," a term found in a separate portion of the Salary Continuation Plan statutes. *See* N.C. Gen. Stat. § 143-166.14.

Safety, I.C. No. W90912 (June 4, 2014). According to DPS, *Dobson* stands for the proposition that, if the work duties the agency seeks to assign comply with a physician's recommended work restrictions, those duties are *per se* properly assigned. DPS relies on the following language in *Dobson* for its position:

> The duties of the correctional officer position were not properly assigned as they were not within Plaintiff's restrictions as assigned by his physicians. As such, the Full Commission finds that Plaintiff is entitled to the reinstatement of salary continuation benefits . . . .

This language does not mean what DPS claims. It establishes that work duties that *violate* a physician's work restriction are not duties that may be properly assigned. So, for example, if a physician restricted the employee to light duty with no heavy lifting, the employer could not properly assign the employee to move heavy boxes.

We agree with that reasoning. But it does not follow from the *Dobson* reasoning that work duties that do not violate a physician's work restrictions are *per se* properly assigned. As this case indicates, even when an officer is medically capable of performing certain work duties under normal circumstances, other factors—such as the risk that the normal circumstances unexpectedly devolve into violent confrontations with juvenile offenders—may compel the Industrial Commission to conclude that those duties are not ones to which the officer properly may be assigned. Accordingly, we reject DPS's argument.

Conclusion

For the reasons stated above, we reject the Department of Public Safety's arguments and affirm the Industrial Commission's amended opinion and award.

AFFIRMED.

Judges STROUD and TYSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 1 MARCH 2016)

ANDERSON-GREEN v. N.C. DEP'T OF HEALTH & HUM. SERVS. No. 15-405	N.C. Industrial Commission (361533) (362161)	Affirmed
CARRAZANA v. W. EXPRESS, INC. No. 15-1063	Wilson (14CVS1587)	Affirmed
HOUSTON ENTERS., INC. v. BRADLEY No. 15-403	Mecklenburg (11CVS22790)	Affirmed
HUFF v. N.C. DEP'T OF PUB. SAFETY No. 15-703	Office of Admin. Hearings (14OSP03402)	Affirmed
IN RE A.A.R. No. 15-962	Catawba (13JT12-13)	Affirmed
IN RE D.D.A. No. 14-366	Craven (10JT105)	Vacated
IN RE D.E.M. No. 15-719	Wilkes (14JT91)	Vacated
IN RE J.K. No. 15-989	Cumberland (12JT71)	Affirmed
IN RE M.S. No. 15-694	Davidson (13JT84) (13JT85)	Affirmed
IN RE J.L.H. No. 15-431	Halifax (13JB66)	AFFIRMED IN PART, VACATED AND REMANDED IN PART
PANDURE v. PANDURE No. 15-336	Hoke (12CVS659)	Affirmed
RL REGI N. C., LLC v. LIGHTHOUSE COVE, LLC No. 15-641	New Hanover (10CVS5742)	Affirmed

SPEER v. GREAT W. BANK No. 15-553	Mecklenburg (13CVS11722)	Affirmed
STATE v. CAULDER No. 15-601	Brunswick (13CRS54476) (13CRS54478)	No Error
STATE v. CHRISTENSEN No. 15-791	Mecklenburg (14CRS1072-73)	No Error
STATE v. COXTON No. 15-575	Mecklenburg (12CRS248690-99) (12CRS248701)	Dismissed
STATE v. DUBOSKY No. 15-819	Alamance (13CRS57361)	No Error
STATE v. FLETCHER No. 14-1312	New Hanover (12CRS61266) (13CRS2018-19) (13CRS50425-27)	No Error
STATE v. HOLLAND No. 15-441	Guilford (14CRS82450-51)	No Error
STATE v. LANE No. 15-892	Wake (12CRS202821-22)	NO PLAIN ERROR IN PART, VACATED AND REMANDED IN PART
STATE v. LEGRANDE No. 15-638	Forsyth (14CRS145) (14CRS53614) (14CRS53807) (14CRS53808) (14CRS54921)	Affirmed
STATE v. MARTIN No. 15-294	Mecklenburg (13CRS230200) (13CRS230201)	No Error
STATE v. McPHAIL No. 15-965	Mecklenburg (11CRS218388)	No Error
STATE v. MOSES No. 15-625	Mecklenburg (12CRS234759-62) (12CRS48452-53)	No Error

STATE v. OSTEEN No. 15-546	Henderson (13CRS50510)	No Error
STATE v. PINNIX No. 15-387	Caswell (13CRS50248-50)	No Error
SUGAR MOUNTAIN SKI RESORT, LLC v. VILL. OF SUGAR MOUNTAIN No. 15-544	Avery (13CVS305)	Affirmed

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